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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78- 78-1259

BRUCE H. SHREEVES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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v.

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Bruce H. Shreeves petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion and judgment of the court of appeals, reproduced in Appendix A, has not yet been reported. The memoranda of the Superior Court of the District of Columbia on Government interference with the insanity defense and on the substitution of jurors (two issues presented for review here) are reproduced in Appendices B and C, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1978. This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Government misstatements that cause an eight-month delay in securing a court-ordered independent psychiatric examination for an indigent accused of murder, in a jurisdiction where the accused bears the burden of proof on the insanity issue, deny the accused due process of law?

2. Whether a felony defendant who has been formally charged and who is represented by counsel may be subjected to custodial interrogation by Government officials without notice to his counsel, particularly when the Government is on notice that there is a serious question of the defendant's mental competence?

3. Whether, in a bifurcated felony trial, alternate jurors may be substituted for regular jurors after the regular jurors have begun deliberations?

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Article III, Section 2 of the United States Constitution provides, in pertinent part:

> "The Trial of all Crimes . . . shall be by Jury."

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . and to have the Assistance of Counsel for his defense."

Rule 24(c) of the District of Columbia Superior Court Rules of Criminal Procedure provides, in pertinent part:

> "An alternate juror who does not replace a regular juror shall be discharged at the time that the jury retires to consider its verdict." [1]

STATEMENT OF THE CASE

In January, 1973, petitioner Bruce H. Shreeves was a 22 year-old petty officer in the United States Navy. He was married and had two children. He had no criminal record except for one minor juvenile arrest. In the five days between January 26 and January 30, 1973, he allegedly killed five persons and seriously wounded a sixth. Four of these killings occurred in Maryland, where Shreeves was convicted and is now incarcerated on multiple life sentences.

This petition arises out of Shreeves' conviction for the fifth killing, which occurred in the District of Columbia. Shreeves pled not guilty and not guilty by reason of insanity, and in a bifurcated trial was found guilty and not insane. Shreeves was sentenced to concurrent terms of twenty years to life (felony murder), fifteen years to life (second degree murder) and fifteen years to life (armed robbery), all to be served consecutively to his Maryland life sentences.

1. Facts Relating to Government Interference With Insanity Defense

Shreeves was arrested in the District of Columbia as a fugitive from the Maryland homicide charges. Robert Golten, of the District of Columbia Public Defenders Office, was appointed to represent Shreeves at his extradition hearing. Counsel perceived that there was a serious question concerning Shreeves' mental status and arranged for a mental examination by Dr. Eugene Stam-

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[1] Rule 24(c) of the Federal Rules of Criminal Procedure provides, in part: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

meyer, a clinical psychologist, at the District of Columbia jail. When Dr. Stammeyer supported counsel's observations, counsel moved before the District of Columbia court presiding over Shreeves' extradition proceedings for an independent psychiatric examination of Shreeves, noting that "[t]he longer the delay in performing a psychiatric examination the less relevant and probative is the examination." [2]

The Government opposed the motion, stating that "[a]uthority to order an examination exists *only* when a person will stand trial or has stood trial in the District of Columbia," and that "[s]ince *any* trial of this fugitive will be in Maryland any psychiatric examination relating to a defense of insanity has no purpose in the District of Columbia." [3]

At the time it made those representations, the Government was in possession of substantial evidence implicating Shreeves in the District of Columbia homicide. The Government had a confession of Shreeves' co-defendant implicating Shreeves in this homicide and Shreeves' own admission that he had been at the scene and had seen the decedent "fall." The Government has admitted that Shreeves was then in "the investigative 'focus'" for this homicide and has never denied Shreeves' counsel's assertion that an affidavit in support of an arrest warrant for Shreeves for the District of Columbia homicide had already been prepared at the time of his extradition hearing.[4]

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[2] Motion for Psychiatric Examination, dated March 1, 1973.

[3] Opposition to Defendant's Motion for Psychiatric Examination, at pp. 2, 5 (emphasis added).

[4] Tr. Col. 9, p. 516; Vol. 11, p. 821; brief for Appellee, at 59 n. 40; *compare* Motion to Dismiss Indictment, dated November 19, 1974, *with* Opposition to Motion to Dismiss, filed December 23, 1974, *and see* Brief for Appellant Bruce H. Shreeves, at 4-5; Reply Brief for Appellant Bruce H. Shreeves, at 1.

Relying on the Government's representations, the court denied Shreeves' motion. Shreeves was indicted in the District of Columbia less than three weeks later. His first court-ordered independent psychiatric examination in the District of Columbia did not take place until October, 1973—eight months after the crime, and seven months after his request.

At trial, the Government took advantage of this delay in its attack on the testimony of Dr. Stammeyer—the only expert that examined Shreeves immediately after his arrest. The Government effectively discredited Dr. Stammeyer's opinion that the crime was a product of Shreeves' mental illness by arguing that Dr. Stammeyer was only a psychologist, not a psychiatrist, that his testimony was biased because he was hired by the defense and was not an independent expert appointed by the court, and that his observations were unreliable since they were made in jail rather than in a hospital.[5]

The court of appeals acknowledged that the Government had made "misstatements" in opposing Shreeves' motion for an independent psychiatric examination, and did not dispute Shreeves' argument that he would have received a prompt, independent psychiatric examination but for these misstatements. But it upheld Shreeves' conviction on the ground that he had the burden of proving both that the Government's misstatements were an "intentional device to gain tactical advantage" and that the delay had caused him "substantial prejudice," and that it "[could] not say the trial court erred" in finding that Shreeves had not met this dual burden.[6]

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[5] Tr. Vol. 17, pp. 152-66, 229-31; Vol. 18, pp. 29, 40-44, 129-30, 152-53; Vol. 23, pp. 1595-97 (summation).

[6] Slip opinion at 16-18, *infra* pp. 16a-17a.

2. Facts Relating to Right to Counsel

After Shreeves' arrest, Deputy Sheriff Purdy of Saint Mary's County, Maryland, contacted Shreeves' counsel, Robert Golten, several times seeking permission to talk to Shreeves. Golten informed Purdy that he would advise Shreeves not to talk with Purdy. Nevertheless, on March 7, 1973, Deputy Purdy went to the District of Columbia jail to interrogate Shreeves without informing Golten. Although Purdy had to wait for a time at the jail before seeing Shreeves, he did not attempt to contact Golten. Golten had no knowledge of the interrogation until after it had taken place.[7]

At the jail, Purdy read Shreeves his *Miranda* rights, but did not tell Shreeves that Golten was unaware of the interrogation, or that Golten had stated that he would advise Shreeves not to submit to questioning.[8] At the time of this interrogation, the question of Shreeves' mental competence had already been raised in court, and Shreeves' statements during the interrogation lent support to his counsel's and a psychologist's doubts on that score.[9] In the course of the interrogation Shreeves made damaging admissions. The trial judge denied Shreeves' motion to suppress these statements, and portions of them were admitted over objection during the insanity phase of Shreeves' trial.[10]

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[7] Tr. Vol. 3, pp. 496-511.

[8] Tr. Vol. 3, pp. 510-11, 519-24, 567-72, 580-81.

[9] *See* Motion for Psychiatric Examination, dated March 1, 1973. Dr. Stammeyer, who had examined Shreeves several times, supported counsel's observations that there was "a strong suggestion of a serious psychotic process afflicting the defendant." Motion at 2. During the interrogation, Purdy asked: "Do you believe in Jesus Christ?" Shreeves answered: "I believe I am Jesus Christ and that I wrote the Ten Commandments." Tr. Vol. 3, p. 535.

[10] Tr. Vol. 6b, pp. 1171-72; Vol. 19, pp. 461-70; Vol. 23, pp. 1469-73. Shreeves' statement to Purdy—that after the killing he "figured, well, . . . there was no stopping now" (Tr. Vol. 19, pp. 467-69) tended to show that Shreeves understood that his conduct was wrong and that he had the capacity to stop. It was thus exceedingly damaging to his insanity defense.

The court of appeals held that Purdy's conduct did not require suppression of Shreeves' statements and that Shreeves had waived his right to the presence of counsel.[11]

3. Facts Relating to Substitution of Jurors

Shreeves gave timely notice of his intention to assert an insanity defense and requested a bifurcated trial with two separate juries. The court granted a bifurcated trial but determined that both phases would be tried to a single jury. A jury of twelve members and six alternates was selected. These eighteen jurors heard the evidence at the first or "merits" phase of Shreeves' trial, and the twelve regular jurors retired to deliberate and ultimately returned a guilty verdict. The six alternate jurors were not discharged, but were instructed to report back to court at a later time.[12]

Fifteen weeks later the same panel of twelve regular and six alternate jurors heard the insanity evidence. Immediately before closing arguments, the judge called counsel to the bench and suggested that Juror Number 9 be discharged because she had been inattentive. (When the jury was polled at the close of the first phase, Juror Number 9 had expressed uncertainty about the verdict and the jury had been sent back for further deliberation.) Defense counsel opposed the discharge of Juror Number 9 and requested, at a minimum, that she be interrogated on the question of inattentiveness before being discharged. Without *voir dire*, the judge discharged Juror Number 9 and Juror Number 8, whom the judge also found to have been inattentive, and replaced them with alternate jurors.[13]

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[11] Slip opinion at 15; *infra* p. 14a.

[12] Tr. Vol. 16, pp. 787-88, 792-93.

[13] Tr. Vol. 17, pp. 68-72; Vol. 23, pp. 1518-27, 1633.

On appeal, Shreeves challenged this procedure as violative of the Sixth Amendment. The court of appeals rejected Shreeves' argument in a footnote, giving no reasons.[14]

REASONS FOR GRANTING THE WRIT

This petition raises three issues worthy of this Court's attention. The first involves serious prejudice to an accused caused by Government misstatements of fact. The second is an issue on which both the courts of appeals and the state courts are in conflict. The third is a substantial issue of first impression.

1. The Government's Interference With Shreeves' Insanity Defense Deprived Him of a Fair Trial

The Government's conduct here—first delaying Shreeves' psychiatric examination and then taking advantage of that delay at trial—was inconsistent with its duty under the decisions of this Court "to insure that criminal trials are fair." *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977). The facts reveal that the Government's affirmative misrepresentations caused the court to deny Shreeves' motion, thereby delaying Shreeves' first independent psychiatric examination in the District of Columbia by more than seven months, and substantially interfering with Shreeves' ability to present an effective insanity defense.[15] Such interference should not be tolerated

[14] Slip opinion at 29 n. 17; *infra* p. 27a. The court of appeals also rejected Shreeves' argument that the procedure violated D.C. Superior Court Criminal Rule 24(c) (similar to Rule 24(c) of the Federal Rules of Criminal Procedure). Slip opinion at 28-29; *infra* pp. 26a-27a.

[15] It is of course irrelevant that the Assistant United States Attorney at the hearing on Shreeves' motion may not have been aware that his statements were materially misleading. "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done." *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). The individual prosecutor's good faith or bad faith is irrelevant. *United States* v. *Agurs*, 427 U.S. 97, 110 (1976).

where, as in the District of Columbia, the burden of proving an insanity defense rests on the defendant. *See* D.C. Code § 24-301(j); *United States* v. *Greene*, 489 F.2d 1145 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 977 (1974).

There is no question that if Shreeves had been formally charged with the District of Columbia homicide at the time of his first motion for a psychiatric examination, it would have been reversible error to deny the motion. *See Cannady* v. *United States*, 351 F.2d 817 (D.C. Cir. 1965). The same principle should apply here, where Shreeves had not yet been formally charged but was in the custody of the District of Columbia and was in "focus" as the anticipated defendant in the prosecution then being formulated for the District of Columbia homicide.

This Court has recognized that as the time lengthens between the commission of a crime and a psychiatric examination of the accused, the examination becomes less probative of the accused's mental state at the time of the crime. *See Pate* v. *Robinson*, 383 U.S. 375, 387 (1966); *Dusky* v. *United States*, 362 U.S. 402 (1960). The prejudicial effects of delay are especially evident in this case: as a psychiatrist who later examined Shreeves testified, Shreeves was "in a state of *gradual resolution* of his acute psychotic episode" in the period following his arrest, and by the time he received his first examination by a psychiatrist he was "out of the acute phase." Tr. Vol. 19, pp. 251-52 (emphasis added).

By discrediting Dr. Stammeyer's testimony at trial, the Government took advantage of the delay it had caused. Testimony to the same effect as Dr. Stammeyer's, but coming from a neutral, court-appointed psychiatrist who

had examined Shreeves in a hospital setting could not have been discredited the same way. Such testimony, unavailable here only because of the Government's misstatements, might well have created a reasonable doubt as to Shreeves' sanity at the time of the crime. *Cf. United States* v. *Agurs*, 427 U.S. 97, 112-13 (1976). More than a "reasonable likelihood" of prejudice has thus been demonstrated. *See Giglio* v. *United States*, 405 U.S. 150, 154 (1972).

The Government's conduct here violated its duty not to mislead the court with untrue factual representations, *cf. Napue* v. *Illinois*, 360 U.S. 264 (1959); *Giglio* v. *United States*, *supra*, at 153, and its duty not to interfere with the defendant's preparation of his case, *cf. Black* v. *United States*, 385 U.S. 26 (1966); *O'Brien* v. *United States*, 386 U.S. 345 (1967). Indeed, the Government's misstatements in this case led directly to a serious "corruption of the truth-seeking function of the trial process," *United States* v. *Agurs*, *supra*, at 104, and are offensive to "the community's sense of fair play and decency," *Rochin* v. *California*, 342 U.S. 165, 173 (1952), thus depriving Shreeves of due process of law. *See United States* v. *Lovasco*, 431 U.S. 783, 790 (1977).

2. Shreeves' Custodial Interrogation, Conducted Without Notice to His Counsel at a Time When His Mental Competence Was Known to be in Question, Deprived Him of His Right to Counsel

The question whether a represented felony defendant may be interrogated without notice to his counsel arises daily in jails and police stations throughout the Nation. It is an important question, one that this Court has recognized and reserved, and one that should now be decided to resolve the conflict of decisions among the federal courts of appeals and among the states.

The court of appeals below acknowledged that "[i]t is a matter of fundamental legal ethics" that the Government "should not communicate with a represented defendant without notice to, and permission of, the counsel."[16] Yet the court permitted the Government to use highly damaging evidence, obtained against a defendant whose mental competence was known by the Government to be in question, through an admitted violation of this "fundamental" precept.

In *Brewer* v. *Williams*, 430 U.S. 387 (1977), the Court did not reach this question, but recognized and reserved it, noting that the courts of appeals have split on the issue. 430 U.S. at 405-06 and n.11.[17] Both the federal and state courts have been unable to reach a consensus. The First, Tenth and District of Columbia Circuits hold that statements obtained through the interrogation of a represented defendant conducted without notice to counsel must be suppressed.[18] The Third, Fifth,

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[16] Slip opinion at 16; *infra* p. 15a, quoting *Boykins* v. *United States*, 366 A.2d 133, 135 (D.C. 1976). *See* American Bar Association, Code of Professional Responsibility, Disciplinary Rule 7-104.

[17] It is not necessary here to consider the case where a represented defendant himself *initiates* the contact with the authorities and volunteers a statement. *See, e.g., United States* v. *Carlson*, 423 F.2d 431, 442 (9th Cir.), *cert. denied*, 400 U.S. 847 (1970); *United States* v. *Monti*, 557 F.2d 899 (1st Cir. 1977); *United States* v. *Massimo*, 432 F.2d 324, 327 (2d Cir. 1970) (Friendly, J., dissenting), *cert. denied*, 400 U.S. 1022 (1971); *Arrington* v. *Maxwell*, 409 F.2d 849, 853 (6th Cir.), *cert. denied*, 396 U.S. 944 (1969); *Reinke* v. *United States*, 405 F.2d 228, 229 (9th Cir. 1969); *But cf. Beatty* v. *United States*, 389 U.S. 45 (1967), *rev'g per curiam* 377 F.2d 181, 188-91 (5th Cir.). Nor is it necessary here to reach the case where the interrogators do not know that the defendant is represented by counsel. *See, e.g., United States* v. *Johnson*, 529 F.2d 581, 584 (8th Cir.), *cert. denied*, 426 U.S. 909 (1976); *United States* v. *Dority*, 487 F.2d 846 (6th Cir. 1973). *But see United States* v. *Springer*, 460 F.2d 1344, 1354 n.1 (7th Cir. 1972) (Stevens, J., dissenting), *cert. denied*, 409 U.S. 873 (1972).

[18] *See Hancock* v. *White*, 378 F.2d 479, 482 (1st Cir. 1967); *United States* v. *Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); *Mathies* v. *United States*, 374 F.2d 312, 316 (D.C. Cir. 1967) (Burger, J.); *Greenwell* v. *United States*, 336

Sixth, Seventh, Eighth and Ninth Circuits hold, like the court below, that a represented defendant may be interrogated by the police with the same freedom as an uncharged, unrepresented detainee.[19] The Second Circuit holds that, while a represented defendant may waive his right to the presence of counsel at an interrogation, his waiver can be considered knowing and intelligent only after such warnings and explanations as would justify a court in permitting a defendant to proceed *pro se* at trial.[20] The state courts are likewise split on this issue.[21]

F.2d 962, 966 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 923 (1965). *But cf. United States* v. *Monti*, 557 F.2d 899 (1st Cir. 1977).

[19] *See United States* v. *Cobbs*, 481 F.2d 196, 199-200 (3rd Cir.), *cert. denied*, 414 U.S. 980 (1973); *United States* v. *Anderson*, 523 F.2d 1192, 1195 (5th Cir. 1975); *United States* v. *Brown*, 569 F.2d 236, 239, 241-42, 245, 250 (5th Cir. 1978) (*dicta*); *United States* v. *Reynolds*, 496 F.2d 158, 162 (6th Cir. 1974); *United States* v. *Durham*, 475 F.2d 208 (7th Cir. 1973); *United States* v. *Springer*, 460 F.2d 1344, 1350 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972); *Williams* v. *Brewer*, 509 F.2d 227, 233 (8th Cir. 1974), *aff'd* 430 U.S. 387 (1977); *Moore* v. *Wolff*, 495 F.2d 35, 37 (8th Cir. 1974); *United States* v. *Four Star*, 428 F.2d 1406 (9th Cir.), *cert. denied*, 400 U.S. 947 (1970); *Coughlan* v. *United States*, 391 F.2d 371, 372 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968); *cf. United States* v. *Rodriguez-Gastelum*, 569 F.2d 482, 485, 490 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978).

[20] *See United States* v. *Satterfield*, 558 F.2d 655, 657 (2d Cir. 1976), *aff'g* 417 F. Supp. 293, 296 (S.D.N.Y.); *United States ex rel. Lopez* v. *Zelker*, 465 F.2d 1405 (2d Cir.), *aff'g* 344 F. Supp. 1050, 1054 (S.D.N.Y.) (Frankel, J.), *cert. denied*, 409 U.S. 1049 (1972); *Faretta* v. *California*, 422 U.S. 806, 835 (1975). *Accord*, *United States* v. *Brown*, 569 F.2d 236, 241-48 (5th Cir. 1978) (Simpson, Goldberg, Godbold, and Morgan, JJ., dissenting).

[21] *See, e.g., People* v. *Isby*, 267 Cal. App. 2d 484, 73 Cal. Rptr. 294 (Ct. App. 1968) (suppressing); *People* v. *Beamer*, 59 Ill. App. 3d 855, 376 N.E.2d 368 (App. Ct. 1978) (admitting); *Commonwealth* v. *McCarthy*, 348 Mass. 7, 200 N.E.2d 264 (1964) (suppressing); *People* v. *Patterson*, 39 Mich. App. 467, 198 N.W.2d 175 (Ct. App. 1971) (admitting). The highest courts of two states have recently overruled their previous decisions and now hold that a statement taken from a represented defendant in the absence of his counsel must be suppressed. *See People* v. *Hobson*, 39 N.Y.2d

Adoption of the rule followed below has provoked frequent and strong dissents.[22] Indeed, virtually every Circuit has condemned the practice of interrogating a represented defendant without notice to his counsel as unethical,[23] and several have announced or intimated that they will exercise their supervisory power over the administration of justice to curtail such conduct.[24]

This Court's opinion in *Brewer* v. *Williams*, *supra*, appears to support the Second Circuit rule, stating that the same "strict standard" for waiver applies at critical pretrial stages as at trial. 430 U.S. at 404. In *Brewer*, the Court focused on the crucial distinction, ignored by

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479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); *Commonwealth* v. *Hilliard*, 471 Pa. 318, 370 A.2d 322 (1977); *Commonwealth* v. *Sparrow*, 471 Pa. 490, 370 A.2d 712, 725 n. 6 (1977).

[22] In *United States* v. *Springer*, 460 F.2d 1344, 1354-55 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972), Justice (then Judge) Stevens expressed his view that interrogation without notice to counsel is a denial of due process. *See also United States* v. *Brown*, 569 F.2d 236, 241-48 (5th Cir. 1978) (Simpson, Goldberg, Godbold and Morgan, J.J., dissenting); *United States* v. *Durham*, 475 F.2d 208, 211 (7th Cir. 1973) (opinion of Swygert, J.); *United States* v. *Massimo*, 432 F.2d 324, 327 (2d Cir. 1970); (Friendly, J., dissenting), *cert. denied*, 400 U.S. 1022 (1971); *Coughlan* v. *United States*, 391 F.2d 371, 372 (9th Cir.) (Hamley, J., dissenting), *cert. denied*, 393 U.S. 870 (1968).

[23] *See, e.g., United States* v. *Woods*, 544 F.2d 242, 255 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); *United States* v. *Crook*, 502 F.2d 1378, 1380 (3rd Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975); *Moore* v. *Wolff*, *supra*; *United States* v. *Cobbs*, *supra*; *United States* v. *Durham*, *supra*; *United States* v. *Thomas*, *supra*; *United States* v. *Springer*, *supra*; *United States* v. *Four Star*, *supra*; *Wilson* v. *United States*, 398 F.2d 331, 333 (5th Cir. 1968), *cert. denied*, 393 U.S. 1069 (1969); *Lee* v. *United States*, 322 F.2d 770, 777 (5th Cir. 1963) (Wisdom, J.); *Mathies* v. *United States*, 374 F.2d 312 (D.C. Cir. 1967) (Burger, J.).

[24] *See United States* v. *Thomas*, *supra*; *Ricks* v. *United States*, 334 F.2d 964, 971 (D.C. Cir. 1964); *United States* v. *Springer*, *supra*; *United States* v. *Smith*, 379 F.2d 628, 633 (7th Cir.), *cert. denied*, 389 U.S. 993 (1967); *United States* v. *Wedra*, 343 F. Supp. 1183, 1188 (S.D.N.Y. 1972) (Weinfeld, J.).

most of the courts of appeals, between an unrepresented and a represented accused: a defendant who has obtained counsel has, by that very action, "expressed his own view that he is not competent to deal with the authorities without legal advice." 430 U.S. at 405 n. 10 (quoting *Michigan* v. *Mosly*, 423 U.S. 96, 110 n. 2 (1975) (Opinion of White, J.)). And that view is doubly applicable where there is a serious question regarding the mental capacity of the defendant. Here the Government, aware of the defendant's expressed view that he required the assistance of counsel, and also aware that his mental competence was in question, initiated a custodial interrogation—not for the purpose of investigating a crime, but for the sole purpose of obtaining evidence to use against him at trial [25]—without notice to his counsel. Such conduct cannot be reconciled with the constitutional protections of the Sixth Amendment or the integrity of our adversary system of justice.

This case provides a suitable vehicle for the resolution of this important and much-disputed issue in the administration of criminal law.

3. The Substitution of Jurors in the Second Phase of Shreeves' Trial, After the Jury Had Already Deliberated to a Verdict in the First Phase, Violated the Applicable Rule and the Constitution

The judgment below represents, to the best of counsel's knowledge, the first opinion by any federal court approving the replacement of a juror with an alternate

[25] *See Escobedo* v. *Illinois*, 378 U.S. 478, 484 (1964); *Spano* v. *New York*, 360 U.S. 315, 325 (Douglas, J., concurring), 327 (Stewart, J., concurring) (1959). Deputy Purdy's questions, such as "Do you believe in God?" and "Do you believe in Jesus Christ?" were hardly designed to aid in the investigation of unsolved crimes, and could only have been intended to illicit either a confession or to produce evidence relevant to Shreeves' insanity defense—as they did.

after the jury had begun its deliberations. The question whether such substitution is permissible under the Rules of Criminal Procedure and the Constitution presents an important issue of federal law and procedure not previously determined by this Court.[26]

a. *Rule 24(c)*. The judgment below is contrary to the decision of every federal court of appeals that has considered the matter under the less stringent federal rule.[27] While those cases did not involve bifurcated trials, no meaningful distinction can be made on that ground. Nor did the court of appeals below attempt to draw such a distinction. It agreed with petitioner that in a bifurcated trial, "the verdict is the jury's ultimate and definitive response to *all* of the issues which have been presented to it . . . . [T]here is only *one* verdict in the case." [28] Thus, the decision below stands as a precedent applicable to all jury trials.

The court of appeals reached its conclusion that Rule 24(c) had not been offended by reasoning that *only* when

[26] Federal Rule 24(c) provides that alternate jurors "shall be discharged after the jury retires." The D.C. rule is even more specific, providing that alternates "shall be discharged *at the time that* the jury retires." (Emphasis supplied.) While this Court's general practice is not to review decisions of the local courts of the District of Columbia involving matters of "peculiarly local concern," such decisions may be reviewed where "a constitutional claim or a problem of general federal law of nationwide application" is presented or where "egregious error has been committed." *Pernell* v. *Southall Realty*, 416 U.S. 363, 366, 369 (1974). All three of these exceptional circumstances are present here. This Court should exercise its jurisdiction to construe the D.C. rule in the same manner as it would construe the essentially parallel federal rule.

[27] *See United States* v. *Lamb*, 529 F.2d 1153 (9th Cir. 1975) (*en banc*); *United States* v. *Allison*, 481 F.2d 468, 372 (5th Cir.), *supplemental opinion*, 487 F.2d 339, *cert. denied*, 416 U.S. 982 (1973); *United States* v. *Beasley*, 464 F.2d 468 (10th Cir. 1972); *United States* v. *Hayutin*, 398 F.2d 944, 950 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968); *United States* v. *Virginia Erection Corp.*, 335 F.2d 868, 871 (4th Cir. 1964).

[28] Slip opinion at 28; *infra* p. 26a (emphasis supplied).

the jury retired to deliberate after the second phase of the trial did it "retire to consider its verdict" within the meaning of Rule 24(c). But that interpretation is untenable, for the jury's determination on the merits at the end of the first phase is not subject to reconsideration during its deliberations after the second phase.[29] Thus, *both* of the jury's determinations are necessary to constitute "the verdict . . . [on] *all* of the issues" and it follows that during both periods of deliberation, the jury had "retire[d] to consider its verdict" within the meaning of Rule 24(c).[30] The rule was therefore violated when the alternate jurors were not discharged at the time the jury retired after the first phase.[31]

b. *The Constitution.* The decision below holds, in effect, that a jury composed of ten jurors who have participated in the jury's deliberations from the beginning plus two new jurors who have been injected into the jury room midway through the deliberations constitutes an acceptable jury in a federal courtroom. Counsel are unaware of any other case accepting such a proposition. This novel interpretation of the Sixth Amendment, adopted below without discussion,[32] deserves to be rejected by this Court before it can spread and infect other federal and state jurisdictions.

[29] The trial judge instructed the jury at the end of the second phase that Shreeves "*has been convicted* of second degree murder, first degree felony murder and armed robbery." Tr. Vol. 23, p. 1628 (emphasis supplied). He instructed the jury only on the law relating to the insanity defense, and gave the jury a verdict form that provided space only to find that the defendant was "not guilty by reason of insanity," or that "the defense of insanity has not been established." *Id.* at 1623-29, 1631.

[30] If in fact the jury's deliberation after the second phase was the only time it "retire[d] to consider verdict," then Shreeves' conviction would have to be reversed because of the trial judge's instructions to the jury that it was not to reconsider whether or not he was guilty of the crimes charged. *See* fn. 29, *supra.*

[31] Even if this Court views the facts here as raising a question of the application of Rule 24(c) only to bifurcated trials, the issue remains one of importance in light of the courts' encouragement of bifurcated trials and their growing use. *See, e.g., Gregg* v. *Georgia*, 428 U.S. 153, 190-92 (1972) (Opinion of Stewart, Powell and Stevens, JJ.); *Holmes* v. *United States*, 363 F.2d 281, 283 (D.C. Cir. 1966); *United States* v. *Bennett*, 460 F.2d 872, 878-82 (D.C. Cir. 1972).

At common law, if a juror died or for other reasons had to be discharged during trial, the entire case was retried *de novo. See* American Bar Association, *Standards Relating to Trial by Jury* 79 (1968). The substitution of an alternate *during trial* does no violence to this procedure, since the alternate has heard all the evidence as if he had been on the jury from the beginning.[33]

The substitution of a replacement juror after deliberations have begun is an altogether different matter. During the trial an alternate is on an equal footing with the other jurors, but an alternate who is made a juror after deliberations have begun has missed the earlier deliberations and is no longer the other jurors' equal. As the Court of Appeals of New York has held:

> "We believe that the Constitution . . . prohibits the substitution of an alternate juror—in effect a 13th juror—after the jury has begun its deliberation. . . . [W]e believe that, once the deliberative process has begun, it should not be disturbed by the substitution of one or more jurors who had not taken part in the previous deliberation and who had 'cease[d] to function as' jurors." *People* v. *Ryan*, 19 N.Y.2d 100, 104-05, 224 N.E.2d 710, 713, 278 N.Y.S.2d 199, 203 (1966) (citation omitted).

[32] Slip opinion at 29 n. 17; *infra* p. 27a.

[33] This Court has never considered the constitutionality of the alternate juror procedure codified in federal and local rules 24(c), but it has been upheld in a court of appeals. *Robinson* v. *United States*, 144 F.2d 392, 397-98 (6th Cir. 1944), *aff'd* (*cert. limited to other grounds*), 324 U.S. 282 (1945).

The facts in this case provide an excellent illustration of the dangers inherent in permitting juror substitution after deliberations have begun. Because the Government must prove all elements of the crime, including the intent required for first degree murder, beyond a reasonable doubt even though the defendant has the burden of proof on the insanity issue, *see Leland* v. *Oregon*, 343 U.S. 790 (1952), the facts found by the jurors in their deliberations during the first phase of Shreeves' trial undoubtedly affected their views of his insanity defense. But during the deliberations on his insanity defense, Shreeves got a mixture of some jurors who had participated in the earlier deliberations and some who had not. It is very doubtful that the new jurors, having had no opportunity to test their own views of the evidence on Shreeves' "guilt" against those of the other jurors during the first phase deliberations, and lacking knowledge of the basis of the jury's earlier determinations, could have participated as equals in the second phase deliberations, or would have been accepted as equals by the other jurors.[34] Nor could the original jurors be expected to reopen their thinking on issues of fact they determined in the first phase, even when those issues bore directly on the insanity determination, in response to doubts expressed by persons who

[34] When opposing Shreeves' pretrial motion for two separate juries, the Government argued:

> "The facts in the case are extremely important . . . and, therefore the issue of responsibility must be decided upon those facts as the jurors on the basis of their deliberations in assessing credibility and weighing the evidence determine where the truth actually lies. *The only people that could do that are the twelve jurors who participate in the deliberation on that one area,* and that's a problem the Government sees with the Court's plan in allowing the substitution of jurors, whether it be for cause or otherwise, after the jury has begun its deliberations and determined where the truth lies as to the disputed facts.
>
> * * * * *
>
> "[The jury has] to decide the insanity defense based upon the facts as they find them as this crime occurred and how it

were not present at the first phase deliberations.[35] The California Supreme Court has explained the jury dynamics that underlie this belief:

> "Deliberations provide the jury with the opportunity to review the evidence in light of the perceptions and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations." *People* v. *Collins*, 17 Cal. 3d 687, 693, 131 Cal. Rptr. 782, 786, 552 P.2d 742, 746 (1976), *cert. denied*, 429 U.S. 1077 (1977).[36]

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occurred, and for that reason *it's impossible to have, say, even ten jurors with a complete knowledge of the facts and two jurors that just have to say well, yes,* since you say that's what the facts are, we have to agree with you, because they are not the fact-finding persons—the twelve jurors are—not anyone that was substituted at a later time . . . [substitute] jurors are going to be crippled, they're half jurors."

Tr. Vol. 1, pp. 54, 57 (emphasis added). In its second phase closing argument, the Government urged the jurors to consider and apply their findings from the first phase to the question of Shreeves' sanity. The two new jurors had no choice but to go along with the previous decision of the other ten on the question of, for example, whether Shreeves was convicted of murder for pulling the trigger or only for aiding and abetting his co-defendant. As the Government argued before trial, the two new jurors were "crippled . . . half jurors" in the deliberation on Shreeves' insanity defense.

[35] The well-know experiments of S. E. Asch illustrate the great degree to which individuals will be unable to express or maintain their own opinions in the face of a contrary opinion unanimously held by a pre-existing majority. *See* S. Asch, *Effects of Group Pressure on the Modification and Distortion of Judgments*, in *Groups, Leadership, and Men* (H. Geutzkow ed. 1951); S. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 Psychological Monographs No. 9 (1957). *Cf.* F. Merei, *Group Leadership and Institutionalization*, 2 Human Relations 23 (1949).

[36] As in California, a criminal jury in the District of Columbia must consist of twelve members (unless the parties stipulate

The American Bar Association rejected a proposal to permit juror substitution during deliberations on the ground

> "that it is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of the prior group discussion." American Bar Association, *Standards Relating to Trial by Jury* 82 (1968).

Indeed, a juror's participation *vel non* in the first phase of deliberations may well have affected even his or her ability to recall the evidence presented. Personal experience has taught each of us that we will remember a given set of facts better if we have discussed and deliberated upon it and reviewed our recollection of it when our memory was fresh.[37] The regular jurors did this in their first deliberation, but the alternates did not; they went home. It is unlikely that they remembered the evidence as well as the ten regular jurors by the time of the second deliberations, four months later. Similarly, the alternate jurors' ignorance of the jury's findings on "guilt" meant that they could not know what evidence the other jurors might regard as crucial in the insanity phase and thus could not focus their attention or their memory on that evidence during the second phase of the trial. Indeed, their attentiveness in general during the second phase was not likely to be as great as the regular jurors', because of their expectation that at the end of the evidence they would be sent home again, and not involved in the

otherwise). D. C. Superior Court Criminal Rule 23(b). And the constitutional guarantees of jury trial, Art. II § 2 and the Sixth Amendment, which apply directly and of their own force to the District of Columbia, *Pernell* v. *Southall Realty*, 416 U.S. 363, 370 (1974); *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 5 (1899), require that its verdict be unanimous. *See Johnson* v. *Louisiana*, 406 U.S. 356, 369-71 (1972) (prevailing opinion of Powell, J.).

[37] *Cf.* H. Gurnee, *A Comparison of Collective and Individual Judgments of Fact*, 21 J. of Experimental Psych. 106 (1937).

deliberations.[38] Thus, a "realistic appraisal of psychological tendencies and human weakness," *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975), supports the view that the historical requirement that jurors not be replaced after deliberations have commenced is an essential attribute of the jury system. The court of appeals' departure from this practice deserves this Court's examination.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 13, 1979

[38] *See* American Bar Association, *Standards Relating to Trial by Jury* 80 (1968); *cf. Commonwealth* v. *Bellino*, 320 Mass. 635, 71 N.E.2d 411, 415, *cert. denied*, 330 U.S. 832 (1947); E. J. Phares, *Perceptual Threshold Decrements as a Function of Skill and Chance Expectancies*, 53 J. of Psych. 399 (1962).

Appendices

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 9233

BRUCE H. SHREEVES,
APPELLANT,

v.

UNITED STATES,
APPELLEE.

Appeal from the Superior Court of the
District of Columbia

(Hon. Harold H. Greene, Extradition Hearing Judge)

(Hon. John Garrett Penn, Trial Judge)

(Argued June 13, 1978 Decided November 15, 1978)

Robert B. McCaw, with whom *John H. Pickering*, *Arthur F. Matthews*, *Timothy N. Black*, and *Arthur B. Spitzer*, appointed by the court, were on the brief, for appellant.

Cheryl M. Long, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, and *John A. Terry*, Assistant United States Attorney, were on the brief, for appellee.

Before NEWMAN, *Chief Judge*, FERREN, *Associate Judge* and MURPHY, *Associate Judge*, Superior Court of the District of Columbia.*

NEWMAN, *Chief Judge*: Appellant was tried by a jury in a bifurcated trial and found guilty of felony

* Sitting by designation pursuant to D.C. Code 1973, § 11-707(a).

murder, second-degree murder, and armed robbery. In the second phase of the trial, the jury rejected his defense of insanity. Appellant raises the following issues on appeal: (1) denial of his Sixth Amendment right to counsel when appellant was interrogated in the D.C. Jail by a Maryland police official without the consent of his attorney; (2) denial of due process by the trial court's failure to order an independent psychiatric examination at a pretrial extradition proceeding; (3) denial of his Sixth Amendment right to a speedy trial; (4) the trial court's failure to suppress (a) evidence seized from appellant's car by Maryland police officials during the course of their investigation into crimes committed by appellant in that state, and (b) an admission made by appellant during a post-arrest interrogation; (5) the trial court's failure to give appellant's requested jury instruction on felony murder; and (6) denial of his Sixth Amendment right to trial by jury as a result of substituting two alternate jurors at the close of the insanity phase of the trial. In Part I we set forth the facts. In Part II we address the issue of whether appellant's right to counsel was violated by the Maryland police official when he interrogated appellant without the presence of or permission of appellant's counsel. In Part III we discuss the issues concerning governmental delay; *i.e.*, failure to order an immediate psychiatric examination at the time of the extradition proceedings and the speedy trial claim. The suppression questions are addressed in Part IV, and the claims of trial court error concerning jury instruction requests and juror substitution are analyzed in Part V. Finding no reversible error, we affirm.

I. Facts

At about 7:30 a.m. on January 26, 1973, appellant and Caroll Milburn robbed and killed Charles R. Myles in front of Myles' home in the District of Columbia. Milburn, who pled guilty to a charge of second-degree

murder before appellant's trial, was the principal government witness. He testified that appellant and he robbed Myles and that appellant shot and killed him with a .38 caliber revolver.

According to Milburn, appellant and he drove to the District of Columbia from St. Mary's County, Maryland in appellant's 1966 maroon Pontiac during the late afternoon of January 24, 1973. The next day they spent some time shooting target practice with three firearms at appellant's cousin's house in Montgomery County, Maryland. On their way back to the District, appellant and Milburn stopped for dinner at a restaurant. Appellant suggested that they rob Myles, who was known to carry large amounts of cash on his person.

Appellant and Milburn trailed Myles from his liquor store to a restaurant, and at about 1:00 or 2:00 a.m. they drove to Myles' house to await his return. Appellant told Milburn to go into an apartment building directly across the street from Myles' house and to come out when appellant pulled the gun.

Myles arrived at home between 7:00 and 7:30 a.m. Appellant and Milburn left the car, walked up the street to Myles' house, and started to carry out their plan. In the midst of the robbery, Milburn heard several shots and began to run away. Appellant caught up with him and the two fled the scene in appellant's car.

Appellant returned to Maryland and, the following day, January 27, engaged in several additional acts of violence, including killing a building contractor in White Oak, Maryland.[1] That evening appellant shot a St.

[1] It is clear from the briefs and record in this case that government counsel and defense counsel carefully avoided introducing evidence of the contemporaneous Maryland offenses into the merit phase of appellant's trial. We recite the Maryland events in the statement of facts solely in order to clarify factual details which might otherwise not be fully comprehensible.

Mary's County police officer who stopped his car to investigate the Maryland crimes. Following that incident, the St. Mary's County police posted lookouts for appellant and his maroon Pontiac.

On Sunday, January 28, Deputy Sheriff Donald W. Purdy of the St. Mary's County Police Department was notified that a car registered to appellant and believed to have been involved in two shooting incidents in Maryland had been parked on private land behind a farmers' market in Mechanicsville, Maryland, for approximately seven hours. The farmers' market was approximately three miles from where appellant had last been seen on the previous evening. When Purdy arrived at the location of the car, it began to rain. This impeded taking fingerprints from the exterior of the car. Purdy ordered the car towed to a private garage in Mechanicsville where prints were taken from the exterior and the inside of the car was examined. Rifle ammunition was found on the seat of the car and seized; a revolver holster, a rifle sheath, a pair of binoculars, and a stocking cap found under the front seat were seized. Inside the glove compartment, Purdy found a District of Columbia personal appearance bond and a traffic ticket receipt naming appellant. In addition, the police found a slip of paper on which was written the name "Miles Anderson" and the license number of a vehicle registered to Charles P. Myles, the decedent. No warrant had been sought before the search of the car.

Appellant was arrested by agents of the Federal Bureau of Investigation (FBI) in the District on February 2, 1973, at about 9:40 p.m. He was charged with unlawful flight to avoid prosecution on homicide charges in Maryland. He was advised of his *Miranda* [2] rights at the scene of his arrest and again at the FBI District

[2] *Miranda* v. *Arizona*, 384 U.S. 36 (1966).

of Columbia field office. He signed a form indicating that he understood and waived his rights.[3] Although he signed the waiver form and willingly gave the agents routine descriptive data about himself, he refused to answer questions concerning the Maryland homicides.

A few minutes later, Detective Hugh Triggs of the Metropolitan Police Department (MPD) arrived at the field office and introduced himself as an MPD detective. Triggs inquired whether appellant understood his rights as already read to him, and whether he would consent to talk to him. Appellant replied that he understood his rights and would consent to speak to Triggs. Without stating that he was investigating the Myles homicide, Triggs asked appellant whether he had been in the District of Columbia on January 26, 1973. After denying his presence in the District of Columbia on that date, he admitted that he had driven into the city on that day to pay a traffic ticket. When Triggs asked whether he had driven along Warder Street that day, appellant answered, "I know what you're trying to get at. You're trying to get me involved in the shooting of the gambler." When Triggs again asked if appellant had been on Warder Street that day, he replied, "Well, I was driving down Warder Street on that day, and I saw the gambler falling. I must be a fool. I've said too much."

On the day after appellant's arrest, counsel was appointed to represent him in the extradition proceeding. On February 5, 1973, Deputy Sheriff Purdy came to the District to attempt to persuade appellant to return volun-

[3] The waiver form read:

> Waiver of rights. I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer present at this time. I understand and know what I am doing. No promises or threats have been made to me, and no pressure or coercion of any kind has been used against me.

tarily to St. Mary's County. On that day, when contacted by Purdy seeking to interview appellant, appellant's counsel informed Purdy that he would advise appellant not to talk to Purdy, but that appellant could make his own decision. When Purdy attempted to interview him, appellant said that he would not discuss the Maryland offenses at that time, but that he would do so at a later date. Between February 5 and March 7, Purdy did not see or speak to appellant, although Purdy drove into the District two or three times during that period in connection with the extradition proceedings. At those times, Purdy contacted appellant's counsel about interviewing appellant, but no interview occurred.

On March 7, however, Purdy, accompanied by a news reporter, went to the D.C. Jail to interview appellant without notifying his counsel about the intended interview.[4] Purdy read appellant his *Miranda* rights, which he agreed to waive. Purdy did not tell appellant of his discussions with his trial counsel concerning the interview or that he had not informed counsel of this interview. Purdy did state that if appellant desired the presence of his attorney, he would be summoned. Shreeves stated that he understood his *Miranda* rights and that he did not want to call his attorney. He agreed to speak with Purdy, but before appellant would talk about the Maryland crimes he demanded that the news reporter leave the room. After the reporter had left, Purdy again read Shreeves his *Miranda* rights. Appellant then made admissions to Purdy about the crimes.

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[4] During pretrial proceedings, Purdy testified that he and appellant's counsel several times discussed his desire to interview Shreeves and that he was under the impression that it was counsel's view that, ultimately, the decision whether to talk to Purdy was Shreeves'. Purdy stated that he did not recall whether appellant's counsel had ever indicated that it was important for him to be present if Shreeves decided to speak to Purdy.

During this same time period, appellant's counsel, believing that there could be a serious question concerning appellant's mental status, arranged for a clinical psychologist, Dr. Eugene Stammeyer, to examine appellant at the D.C. Jail on February 10, 1973. When Dr. Stammeyer supported counsel's concerns about appellant's mental status, counsel moved, on March 1, for an independent psychiatric examination by the Forensic Psychiatry Division. In the motion, counsel argued "the right to a psychiatric examination as close in time to the offenses charged is an important component of his right to a fair trial and to due process." In its opposition, the government claimed the court had no power to order the requested examinations. Citing D.C. Code 1973, § 24-301(a), the government argued that authority to order a mental examination exists only when a person will stand trial in the District, and it represented that an examination relating to an insanity defense would have no purpose in the District since "any trial of this fugitive will be in Maryland." The court declined to order an independent psychiatric examination and on March 14, ordered that appellant be surrendered to Maryland to stand trial for murder.[5]

On April 4, 1973, following his rendition to Maryland, appellant was indicted in the District of Columbia for the Myles' murder. The same counsel who had represented him in the extradition case was appointed to represent him on the murder charge. He was arraigned on April 16, 1973.

In June, after appellant filed notice of intent to raise an insanity defense, the government moved for his com-

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[5] Upon his return to Maryland, appellant was subjected to mental examinations at Clifton T. Perkins Hospital. The results of these examinations were available to both the government and defense experts who testified at appellant's trial here in the District of Columbia.

mitment to St. Elizabeths Hospital pursuant to D.C. Code 1973, § 24-301(a) for mental examination. Appellant opposed the motion, arguing that there was an inherent conflict of interest in permitting the same doctors who provide treatment to those found incompetent or not guilty by reason of insanity to perform pretrial competency examinations. Instead, in July the appellant requested that the court order an examination by the Forensic Psychiatry Division. The court denied appellant's request and on August 1, 1973, ordered him to St. Elizabeths for a mental examination. On September 11, 1973, the court ordered that appellant also be examined by the Forensic Psychiatry Division. However, because he was in Maryland defending against other charges, appellant was not admitted to St. Elizabeths until October 3, and the examination by the Forensic Psychiatry Division did not take place until March 1974.

On June 5, 1974, appellant moved to dismiss the indictment for lack of a speedy trial. The motion was denied. On June 17, the trial court began hearings on pretrial motions. Counsel moved to suppress, *inter alia*, (a) all evidence seized from appellant's car by the St. Mary's County police; (b) appellant's admissions concerning his presence in the District of Columbia on the day of the Myles murder given to MPD Detective Triggs; and (c) any evidence arising from Deputy Purdy's interrogation of appellant on March 7, 1973, without the knowledge or consent of Shreeves' counsel. The trial court denied the motions on June 25, 1974, ruling: (a) that the car had been abandoned and thus appellant had no standing to contest the search; (b) that appellant was properly advised of his *Miranda* rights and that his statements to Detective Triggs were admissible; and (c) that appellant understood his rights when Deputy Purdy interviewed him at the D.C. Jail, and that he waived his right to the presence and advice of counsel.

The first phase of the bifurcated trial began June 26, 1974.[6] After the issue of instructions had been settled and closing arguments completed, defense counsel requested that the court give a supplemental instruction on the felony murder charge.[7] The government objected that the instruction was untimely and factually and legally unsupportable. The trial court denied the request.[8]

During the deliberations, the jury requested further instruction on a simplified statement of felony murder. The court then reread the original felony murder instruction without objection from defense counsel. After the jury had left the courtroom, counsel again requested the supplemental instruction. The court denied the request.

On July 19, 1974, the jury returned a verdict of guilty on all counts. When the jury was polled, however, Juror 9 stated that she was undecided. The defense moved for

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[6] Appellant's counsel requested a bifurcated trial with two separate juries. The trial court denied this motion for separate juries and ruled that one jury should hear both the merits and the insanity phases of the case. This ruling is not challenged on this appeal.

[7] The requested instruction read:

> If you find that Carroll Milburn shot and killed the decedent Miles [*sic*] and that the defendant Bruce Shreeves was there at the time, but if you find that the shooting was outside the plans of the robbery and not in furtherance of the purpose, that is, that Milburn in shooting Miles [*sic*] was acting on behalf of himself and not on behalf of both he and Shreeves, then you may acquit Shreeves of first degree murder, but convict him of armed robbery. [Tr. Vol. V, 02969]

[8] The trial court gave the jury Standard Jury Instruction 4.22 that reads:

> If two or more persons, acting together, are perpetrating or attempting to perpetrate robbery and one of them, in the course of the felony and in furtherance of the common purpose to commit the felony, kills a human being, both the person who committed the killing and the person or persons who aided and abetted in the felony are guilty of murder in the first degree.

a mistrial on the ground that the "undecided" juror could thereafter be intimidated by the other jurors. The motion was denied and the judge sent the jury back to resume deliberations with appropriate instructions on further deliberations. An hour later, the jury returned with a verdict of guilty on all counts.

The insanity phase of the trial commenced on November 6, 1974.[9] Shreeves presented testimony from four lay witnesses, one clinical psychologist, and one psychiatrist, all intended to satisfy his burden of proving insanity at the time of the offense. The government countered the insanity defense by presenting evidence of Shreeves' other violent crimes committed in Maryland contemporaneous to the Myles murder, as well as expert psychiatric testimony.

Near the end of the insanity phase of the trial, the court called counsel to the bench and suggested that Juror 9 be discharged because she had repeatedly been inattentive during the trial. Defense counsel objected. When the trial court ruled that he would excuse Juror 9, defense counsel moved for the removal of Juror 8, who also had been inattentive. The judge replaced Jurors 8 and 9 with two alternate jurors who had heard all the evidence presented during both phases of the trial.

On November 21, 1974, the jury found that appellant had failed to establish the defense of insanity on any of the counts.

II. Appellant's Right to Counsel

Appellant claims that his Sixth Amendment right to counsel was violated by the use of statements obtained during the March 7 interview conducted without the presence or consent of his attorney. When appellant

[9] The delay between the first and second phases of the bifurcated trial was for reasons not germane to this appeal.

moved to suppress statements from that interview before trial, the trial court conducted an evidentiary hearing, at which both Deputy Purdy and appellant's counsel testified. The trial court found that Purdy twice advised appellant of his *Miranda* rights. In addition, the court found that although Purdy advised appellant that he had counsel and asked whether or not he wanted to have his counsel present during the interview, appellant indicated that he did not wish to confer with his attorney and consented to be interrogated without counsel being present. Finding that appellant understood his rights, the trial court ruled that appellant validly waived his right to counsel.

Appellant now argues that a defendant who has been charged formally and who is represented by counsel has a right to have his attorney notified before he is interrogated by government officials. He contends that the right to notification of his attorney is a corollary to his Sixth Amendment right to counsel, and any statement made during an interview conducted without notice to his attorney should be suppressed.

At the outset, we must address the question whether a defendant may ever waive his right to the presence of counsel, after it has attached, without notice to or consultation with his attorney. Various federal circuit courts of appeal and state courts have answered this question differently. *See, e.g., United States* v. *Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); *United States* v. *Springer*, 460 F.2d 1344, 1350 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972); *United States ex rel. O'Connor* v. *New Jersey*, 405 F.2d 632 (3d Cir.), *cert. denied*, 395 U.S. 923 (1969); *State* v. *Witt*, 422 S.W.2d 304 (Mo. 1967); and *State* v. *Green*, 46 N.J. 192, 215 A.2d 546 (1965), *cert. denied*, 384 U.S. 946 (1966). Although the Supreme Court has not specifically resolved the issue, we believe that the holding in *Brewer* v. *Williams*, 430 U.S. 387 (1977), supports the view that a

defendant may waive his right to counsel without consulting his attorney.

In *Brewer, supra*, the defendant was convicted of murder in the abduction of a 10-year-old girl which occurred in Des Moines, Iowa. After turning himself in to authorities in Davenport, Iowa, two days after the child's disappearance, the defendant Williams was formally charged with abduction. Williams, an escaped mental patient, conferred in person with an attorney in Davenport and by telephone with his attorney in Des Moines. Both attorneys told Williams to make no statement during the ride from Davenport back to Des Moines and that the police had agreed not to question him. During the ride, Williams indicated that he would give the police a statement after he spoke with his attorney upon arrival in Des Moines. Nonetheless, during the ride one of the officers coaxed Williams into revealing the site of the child's grave.

The Supreme Court ruled that at that time, Williams was entitled to the assistance of counsel. Although Williams apparently understood his right to counsel, "*waiver requires not merely comprehension but relinquishment*, and Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right." 430 U.S. at 404. (Emphasis added.) The Court stated further:

> The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not*, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not. [*Id.* at 405-06 (footnote omitted) (emphasis in original).]

In his concurrence, Justice Powell states explicitly what we, too, infer from the majority's holding:

> The dissenting opinion of THE CHIEF JUSTICE states that the Court's holding today "conclusively presumes a suspect is legally incompetent to change his mind and tell the truth until an attorney is present." I find no justification for this view. On the contrary, *the opinion of the Court is explicitly clear that the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel.* We would have such a case here if the State had proved that the police officers refrained from coercion and interrogation, as they have agreed, and that Williams freely on his own initiative had confessed the crime. [*Id.* at 413 (citations omitted) (emphasis added).]

Cases since *Brewer* also reject a *per se* prohibition against communications between police and defendants without prior notice to counsel. *E.g., United States* v. *Brown*, 569 F.2d 236 (5th Cir. 1972) (en banc); *United States* v. *Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir. 1978) (en banc); *Watson* v. *State*, 282 Md. 73, 382 A.2d 574 (1978). We agree with the courts' holding that a defendant may waive his right to counsel without prior notice to or consultation with his attorney.

Although the right to counsel thus may be waived, the government bears a heavy burden to show: (a) that the defendant understood that in fact he had a right to the presence of counsel during an interrogation, *see Brewer* v. *Williams, supra* at 404; and (b) that the defendant intentionally relinquished or abandoned that "known right." *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938); *Brewer* v. *Williams, supra* at 404. *See United States* v. *Rodriguez-Gastelum, supra* at 485 (citing *Brewer* for the proposition that "the burden is greater when the government attempts to show a waiver after the right to counsel has been asserted than when the government attempts to show a waiver of the right to remain silent"); *United States* v. *Cobbs*, 481 F.2d 196, 199 (3d Cir.), *cert.*

denied, 414 U.S. 980 (1973); *United States* v. *Springer*, *supra* at 1352.

In deciding whether the government has satisfied its greater burden, the trial court may look to the particular facts and circumstances surrounding the case, including the experience, background, and conduct of the defendant. *Johnson* v. *Zerbst*, *supra* at 464; *United States* v. *Rodriguez-Gastelum*, *supra* at 488. The trial court should conduct an on-the-record inquiry of the police official, defense counsel, and other appropriate witnesses. The court must make *findings of fact* to ensure that the record clearly reflects that the waiver of the presence of counsel was a knowing, voluntary, and intelligent relinquishment of a known right. *United States* v. *Cobbs*, *supra* at 200.

The record in this case reflects thorough examination of both Deputy Purdy and trial counsel. There was evidence to support the trial court's finding that appellant was advised twice of his right to the presence of counsel and that appellant refused Deputy Purdy's offer to call counsel. We find no error in the trial court's ruling that Shreeves validly waived his right to the presence of counsel during the interrogation by Deputy Sheriff Purdy.[10]

[10] This case is distinguishable from *Brewer* v. *Williams*, *supra*, in several significant respects. First, unlike Williams, appellant Shreeves never asserted that he wanted to speak to his attorney before making statements to Detective Purdy. Second, in contrast with *Brewer*, although Detective Purdy had contacted Shreeves' counsel about the possibility of questioning appellant, there is no proof that Shreeves' attorney requested Purdy to refrain from interrogating Shreeves unless his counsel was present. In fact, Purdy was left with the impression that the decision whether to talk to him was entirely Shreeves'. Finally, while the only evidence indicating a knowing and voluntary waiver in *Brewer* was the fact that Williams had actually confessed, the validity of Shreeves' waiver is supported by the fact that Purdy twice read appellant his *Miranda* rights and offered to call his attorney before questioning him, and that appellant indicated he understood his rights, declined the offer to call his attorney, and agreed to waive his rights before confessing to Purdy.

Despite our holding that under the appropriate circumstances the right to the presence of counsel may be waived, we reiterate what we said in *Boykins* v. *United States*, D.C. App., 366 A.2d 133, 135 (1976):

> [T]he government ordinarily should not communicate with a represented defendant without notice to, and permission of, the counsel. . . . [Communications without prior notice to counsel] is a highly questionable governmental practice. Undoubtedly, too, the Bar would make itself heard if counsel, or their agents, were to make it a practice to interview, without advance notice to counsel, clients of opposing lawyers in civil or criminal cases . . . . It is a matter of fundamental legal ethics that this not be done (American Bar Association, Code of Professional Responsibility DR 7-104).

III. Governmental Misstatements and Delay

A.

Appellant asserts that his Fifth Amendment due process rights were violated by the court's denial of his request at the extradition hearing for an immediate psychiatric examination. He argues that the denial was based on the government's erroneous assertions that because appellant would not be tried in the District of Columbia, the court had no authority to order the requested mental examination. He claims that these government misstatements severely hampered his ability to present an effective insanity defense since the only person who examined him at the time of his arrest was a psychologist whose opinions were assailed by the government at trial for bias as a defense-retained expert and

whose opinions were denigrated as those of a psychologist rather than a psychiatrist.[11]

Appellant also raises the issue of preindictment delay. According to appellant, the government deliberately delayed indicting him for the Myles murder until after the extradition proceedings to prevent an immediate psychiatric examination. Thus, says appellant, the government's misstatements at the extradition proceedings were consistent with the government's plan to delay his indictment.

To prevail on his claim that his due process rights were violated by delay, a defendant must show that the delay "caused substantial prejudice to [his] right to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States* v. *Marion*, 404 U.S. 307, 324 (1971). If a defendant can satisfy this two-pronged burden, due process mandates dismissal of the indictment. *Id.*

We conclude that appellant failed to prove either of the *Marion* requirements, and that the court correctly denied his motion to dismiss the indictment. First, it is not clear that the government's misstatement was "an intentional device to gain tactical advantage over the accused." The government did have within its possession the admissions appellant made to Detective Triggs at the time of his arrest as well as some initial testimony given by Milburn to the grand jury investigating the Myles homicide. However, Milburn appeared a second time before the grand jury on March 29, 1973, two weeks after appellant had been ordered returned to Maryland. This latter appearance by Milburn is consistent with a good faith effort by the government to present an ap-

[11] In the context of this case, we have no occasion to decide whether one alleged to be a fugitive, upon an appropriate showing, has a right to a competency hearing and determination prior to an extradition hearing.

propriate case to the grand jury in order to secure an indictment. On this record, we cannot say the trial court erred in finding that the government was not attempting to gain a tactical advantage by delaying appellant's indictment to prevent an immediate mental examination.

Even if appellant had satisfied the first prong of the *Marion* test, he still must show that the delay caused him "substantial prejudice." The trial court found to the contrary. Shortly after appellant was transferred to the Maryland authorities pursuant to the extradition order of March 14, 1973, he received a psychiatric examination at Clifton T. Perkins State Hospital. The results of this examination were available to appellant in his District of Columbia trial and could have been utilized by him. While it is true that a mental examination at a state hospital is not the type of independent psychiatric examination which appellant sought, its availability coupled with the lack of any further showing of "substantial prejudice" lead us to conclude that the trial court properly denied the motion to dismiss the indictment.

B.

Appellant also claims that his Sixth Amendment right to a speedy trial was violated as a result of the nearly seventeen-month delay between his arrest on February 2, 1973, and the commencement of his trial on June 26, 1974. A delay of more than one year provides "prima facie merit" to a claim of speedy trial deprivation, *Branch* v. *United States*, D.C.App., 372 A.2d 998, 1000 (1977); *United States* v. *Mack*, D.C.App., 298 A.2d 509, 511 (1972); *United States* v. *Holt*, 145 U.S.App.D.C. 185, 186, 448 F.2d 1108, 1109, *cert. denied*, 404 U.S. 942 (1971), which raises its own presumption of prejudice. The government then has the burden of affirmatively showing the absence of prejudice. *Day* v. *United States*, D.C.App., —— A.2d —— (No. 11272, July 10, 1978, slip op. at

25); *United States* v. *Bolden*, D.C.App., 381 A.2d 624, 627-28 (1977); *Branch* v. *United States*, *supra* at 1000. In addition, in assessing a speedy trial claim we must apply a balancing test, weighing not only the length of the delay and prejudice to the defendant, but also the reason for the delay and the timeliness of defendant's assertion of his right to a speedy trial. *Barker* v. *Wingo*, 407 U.S. 514, 523 (1972).

Here the delay totaled sixteen months and twenty-three days from the time appellant was brought before the Superior Court on the fugitive charge until jury selection began for his trial.[12] The delay was caused by three factors: (1) pretrial motions and hearings; (2) appellant's own unavailability due to trial proceedings in Maryland; and (3) controversy concerning appellant's mental examination at St. Elizabeths Hospital.[13] The time required to resolve pretrial motions is regarded as neutral. *United States* v. *Jones*, 154 U.S.App.D.C. 211, 213, 475 F.2d 322, 324 (1972). The delays caused by overcrowded dockets are chargeable to the government, but the government bears a less heavy burden in the speedy trial calculus for such than for delays resulting from more purposeful governmental conduct. *United States* v. *Jones*, *supra* at 213, 475 F.2d at 324; *United States* v. *Perkins*, D.C.App., 374 A.2d 882, 883-84 (1977). The time spent in the dispute over the procedures to be used

[12] Although Shreeves was not formally indicted on the D.C. charges until April 4, 1973, we believe that the appropriate time frame for a speedy trial analysis, on the particular facts in this case, should commence from the time of actual restraint imposed by arrest and holding to answer a criminal charge. Thus, we deem the starting point of the time calculation to be February 3, 1972. *United States* v. *Marion*, *supra* at 320; *Dillingham* v. *United States*, 423 U.S. 64 (1975).

[13] The controversy over the mental examinations concerned appellant's request to be examined by Forensic Psychiatric rather than St. Elizabeths, and his later request that his attorney be present during the St. Elizabeths examination.

during appellant's mental examination at St. Elizabeths, and the delay caused by the two mental examinations, approximately five months, "are not normally taken into account for purposes of determining the question of a denial of speedy trial" since " 'a principal cause of postponement [was] the deliberate pace of the system of safeguards designed to protect the accused. . . .' " *United States* v. *Canty*, 152 U.S.App.D.C. 103, 107, 469 F.2d 114, 118 (1972), quoting *Blunt* v. *United States*, 131 U.S.App.D.C. 306, 310, 404 F.2d 1283, 1287 (1968), *cert. denied*, 394 U.S. 909 (1969). Moreover, the delay of approximately four and one-half months spent in the Maryland proceedings is essentially "neutral" time, chargeable to neither party unless the totality of the circumstances indicate otherwise. *United States* v. *Canty*, *supra* at 107-08, 469 F.2d at 118-19. Thus, of the nearly seventeen-month delay, approximately nine and one-half months were chargeable to neither side. The remaining seven and one half months' delay was chargeable to the government but was essentially neutral time due to court congestion.

Appellant did not assert his right to a speedy trial until June 5, 1974, sixteen months after arrest. Thus, most of the delay complained of occurred before the speedy trial demand and must be accorded less significance. *See United States* v. *Jones*, 173 U.S.App.D.C. 280, 297, 524 F.2d 834, 851 (1975).

The assessment of whether the government has successfully rebutted the presumption of prejudice to the defendant, given the delay of more than one year, requires an evaluation of three factors: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; and (3) possible impairment of the defense. *Barker* v. *Wingo*, *supra* at 532. Examination of the record shows that the government has satisfied its burden to rebut the presumption of prejudice which arises from a delay of greater than one year. *See Branch* v.

United States, supra. Because appellant was incarcerated on the Maryland charges as well as on the District of Columbia charges, the delay in the District of Columbia did not cause oppressive pretrial incarceration nor significant additional anxiety.[14] The record establishes that the seventeen-month delay in no way impaired Shreeves' ability to present his defense. On this record, we cannot say that the trial court erred in rejecting the appellant's claim of a deprivation of his right to a speedy trial.

IV. Suppression Issues

Appellant contends that the trial court erred in declining to suppress evidence obtained as a result of the warrantless search of his car. The trial court ruled that the car had been abandoned and that appellant had no standing to contest the search. While we reject the trial court's rationale, we agree that the search was constitutionally permissible and thus the evidence seized therefrom was admissible.

In discussing abandonment, this court has stated:

> The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. . . . [*United States* v. *Boswell*, D.C.App., 347 A.2d 270, 274 (1975) quoting *United States* v. *Colbert*, 474 F.2d 174, 176 (5th Cir. 1973).]

It is apparent from the fact that Shreeves left a substantial number of his personal belongings in the car

[14] For a discussion of the methodology of this court's analysis of the government's rebuttal of defense arguments about pretrial incarceration and "anxiety," *see Day* v. *United States, supra* at 26, 28-29

that, at the time he parked the car, he did not "voluntarily . . . relinquish his interest in the property." *Id.* Rather, his actions evinced "an intent . . . to secrete [the car] and not to abandon it." *Id.* Since the government has failed to meet its burden of showing abandonment "by clear, unequivocal and decisive evidence," *Peyton* v. *United States*, D.C.App., 275 A.2d 229, 230 (1971), we hold that there was no abandonment, and thus that appellant did have standing to contest the search.

Fourth Amendment doctrines state that "a car may be searched or seized without a warrant if there were both exigent circumstances and probable cause to believe that the car will yield contraband or evidence useful for prosecution of crime." Note, *Warrantless Searches and Seizures of Automobiles*, 87 Harv. L. Rev. 835 (1974) (footnote omitted). The probable cause element was clearly present here. The facts (as more fully outlined in Part I, *supra*) that several violent incidents in Maryland had occurred in the days immediately preceding the discovery of appellant's car involving both appellant and his automobile, constituted a strong showing of probable cause to conclude that evidence of the crimes likely would be found in the car. *See Carroll* v. *United States*, 267 U.S. 132 (1925).

Because no warrant was obtained, we must determine whether the government showed "that the exigencies of the situation made [the warrantless search] imperative." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 455 (1971), quoting *McDonald* v. *United States*, 335 U.S. 451, 456 (1948).

We note at the outset that this case falls within the so-called "automobile exception" to the warrant requirement that premises exigency on mobility. *Carroll* v. *United States, supra; Chambers* v. *Maroney*, 399 U.S. 42 (1970). Although the car was immobile when found, Deputy Purdy testified that he did not have sufficient

personnel to post a guard around the car until he could obtain a search warrant. Since the police could have no assurance of continued immobilization without a guard, the circumstances presented a sufficient exigency to search the car without obtaining a warrant. *See United States* v. *Free*, 141 U.S.App.D.C. 198, 202, 437 F.2d 631, 635 (1970). *Cf. United States* v. *Robinson*, 174 U.S.App.D.C. 351, 353-54, 533 F.2d 578, 580-81 (en banc) *cert. denied*, 424 U.S. 956 (1976) (record revealed "surfeit," rather than shortage of police officers to guard car.)

Moreover, we believe that the circumstances place this case within the "getaway car exigency" created by the United States Court of Appeals for the District of Columbia in *United States* v. *Robinson*, *supra*. In *Robinson*, shortly after a bank robbery, the police spotted what they had probable cause to believe was the getaway car. The police surrounded the car, then unlocked it, and a search produced evidence of the crime. The court, sitting en banc, ruled that the search fell "within the spirit, though not the text, of the 'hot pursuit' exception established in *Warden* v. *Hayden*, 387 U.S. 294 (1967)." *United States* v. *Robinson*, *supra* at 356, 533 F.2d at 583.

What the court in *Robinson* said applies with equal force to the exigency here:

> [T]his getaway car case entails exigent circumstances that justify a warrantless search of the car for clues as to identity or location of suspects. The pertinent factors are much like those set out by this court in *Dorman* v. *United States*, 140 U.S.App.D.C. 313, 319-21, 435 F.2d 385, 391-93 (en banc, 1970), as showing "urgent need" justifying a warrantless nighttime entry into a private home to effect an arrest. As in *Dorman*, we have a grave offense; a clear showing of probable cause; a reasonable belief that suspects are armed; a likelihood that the suspects will escape if not speedily apprehended, and

> peaceable entry. This case lacks the element of "strong reason to believe the suspect is in the premises being entered," which was stressed in *Dorman* as justifying a warrantless entry into the suspect's home to make an arrest. But in the case of a car on the street there is both lesser expectation of privacy than in a home . . . , and the entry into a car believed on strong probable cause to be the getaway car is justified, even though the suspect is plainly not now inside, in order to get clues that will aid location and apprehension of the suspect. [*Id.* at 356-57, 533 F.2d at 583-84 (footnotes omitted).]

We hold therefore that because the circumstances surrounding the search of appellant's car provided probable cause as well as an exigency, the search was justified, and the trial court was correct in refusing to suppress the evidence obtained as a result of the search.[15]

V. Other Claims

A. Jury Instructions

Appellant argues that the trial court's refusal on two occasions to give his requested supplemental felony mur-

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[15] Appellant also claims error in the trial court's refusal to suppress incriminating statements made to Detective Triggs concerning the Myles murder pursuant to *Miranda* v. *Arizona*, *supra*. The record is clear that although Triggs did not repeat the *Miranda* warnings, he entered the interview room only a few minutes after appellant had been read the *Miranda* warning and that Triggs was aware of this fact. He asked appellant if he understood his rights and whether appellant would consent to talk to him. Moreover, he specifically identified himself to appellant as a District of Columbia detective who specialized in homicide cases. It was only thereafter that he questioned appellant. We are satisfied that appellant's waiver of his rights to silence was valid. *See United States* v. *Vasquez*, 476 F.2d 730, 732 (5th Cir.), *cert. denied*, 414 U.S. 836 (1973).

der instruction constitutes reversible error.[16] Because neither of these requests was timely made, we find no error.

Prior to the close of the evidence, each side submitted proposed instructions. The trial court discussed the proposed instructions with counsel and ruled on them prior to closing arguments. After the completion of closing arguments, and immediately before charging the jury, the trial court conferred with counsel for both sides, and indicated which instructions he planned to give the jury. At that time, defense counsel submitted his supplemental felony-murder instruction. After retiring, the jury requested a clarifying instruction on felony-murder. The judge conferred with both counsel and reread the original instruction. Only after the jury retired again did defense counsel suggest that the trial court give the previously-requested supplemental instruction.

Super. Ct. Cr. R. 30, which is identical to the federal rule, sets forth the procedural requirements for jury instruction requests:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider

[16] The requested instruction set forth one of the defense theories that the murder was committed by Milburn and was outside the scope of the robbery.

> its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

The requirement that the court inform counsel of its proposed action upon the requests before closing arguments necessarily requires that requests for instructions be submitted prior to closing argument. The time limitation enables opposing counsel both to object to a proposed instruction and to frame his closing argument to address the potential effect on the jury of the requested instruction. *See United States* v. *Tourine*, 428 F.2d 865, 868-69 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); *Schuermann* v. *United States*, 174 F.2d 397, 401 (8th Cir.), *cert. denied*, 338 U.S. 831 (1949).

Here, counsel did not propose his instruction until after closing argument was completed. The record reflects no extenuating circumstances that prevented defense counsel from formulating his request earlier. Therefore, we hold that because the defense failed to comply with the time requirements of Super. Ct. Cr. R. 30, the trial court did not err in denying the request.

We also hold as untimely the defense request for the supplemental instruction following the rereading of the instructions to the jury. Had defense counsel requested the supplemental instruction before the jury retired again, the trial judge then could have exercised his discretion in determining how to respond to the jury's request for clarification. *See United States* v. *Wharton*, 139 U.S.App.D.C. 293, 296 n.9, 433 F.2d 451, 454 n.9 (1970). However, the record reflects the defense request *after* the jury had retired. Such an untimely request violates the clear purpose of Super. Ct. Cr. R. 30.

B. Juror Substitution

Appellant claims error in the trial court's substitution of two inattentive jurors just prior to deliberation of the insanity phase of the trial. He argues that Super. Ct. Cr. R. 24(c) prevents the substitution of jurors with alternates during the second phase of a bifurcated trial. This rule provides in pertinent part:

> Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged at the time that the jury retires to consider its verdict.

Appellant's contention is based on the premise that when the jury retires to consider the merits portion of a bifurcated trial, the jury has "retired to consider its verdict," and thus the alternates should be dismissed. However, this premise is incorrect. In a bifurcated trial, as well as in a unitary trial, the verdict is the jury's ultimate and definitive response to all of the issues which have been presented to it. *Baldwin* v. *State*, 185 Tenn. 205, 204 S.W.2d 1018 (1947); *State* v. *Williams*, 89 N.J.L. 234, 98 A. 416 (1916); *State* v. *Blue*, 134 La. 561, 64 So. 411 (1914). In a trial which has been bifurcated into a merits phase and an insanity phase, but which is to be heard by one jury, there is only one verdict in the case. And that verdict is rendered at the close of the insanity phase (assuming, of course, that the insanity issue has been reached). *See Burks* v. *United States*, —— U.S. ——, 98 S.Ct. 2141 (1978); *Davis* v. *United States*, 160 U.S. 469 (1895).

Thus, in a bifurcated trial where the same jury hears both phases, Rule 24(c) dictates that the alternates

should not be dismissed until the jury retires at the end of the second phase. The trial court here acted within its authority in substituting alternates for the two inattentive jurors at the conclusion of the second phase.[17]

Affirmed.

[17] We find no merit in appellant's alternate argument that the juror substitution resulted in a denial of his Sixth Amendment right to trial by jury.

APPENDIX B

SUPERIOR COURT OF THE DISTRICT
OF COLUMBIA
CRIMINAL DIVISION

No. 19906-73

UNITED STATES OF AMERICA

v.

BRUCE SHREEVES

MEMORANDUM ORDER

This case resulted in a bifurcated trial in two phases, the first phase in July, 1974, and the second phase (insanity) in November, 1974. During the second phase, the defendant moved to dismiss the indictment on the grounds that he had been denied due process of law. Specifically, defendant argues that when he was originally arrested on a fugitive warrant from Maryland, his attorney in the District of Columbia requested a psychiatric examination. The Government objected to that examination on the grounds that there was no case pending in the District of Columbia. Defendant was thereafter transferred to Maryland and did receive an examination in that state. Defendant also contends that at the very time the Government argued against an examination, the Government knew that it was contemplating filing charges against him as a result of the homicide involving Charles Raymond Myles.

This motion was originally an oral motion made during the second phase of the trial. It is this Court's recollection that it indicated that it felt the motion was without merit but invited counsel to submit memoranda on the motion.

After reviewing the memoranda submitted on both sides, the Court concludes that the motion is totally without merit and it is, accordingly, denied. Defendant was arraigned in this case in April, 1973, and has only now raised this motion for dismissal of the indictment. Moreover, the defendant was the subject of extensive psychiatric and psychological examinations in both the District of Columbia and the State of Maryland. During the course of the second phase of his trial involving the issue of insanity he was permitted to call lay witnesses who testified concerning the state of his mind and his actions at or around the time of the offense.

Obviously, it is best if possible to have a psychiatrist or psychologist examine a defendant at or immediately after the time of the commission of an offense. In this case the Court finds that the delay in having a psychological and psychiatric examination of the defendant was not unreasonable and has in no way prejudiced his case. The Court finds no denial of due process and accordingly defendant's motion to dismiss the indictment on those grounds is denied. It is hereby

ORDERED that defendant's Motion to Dismiss Indictment is denied

Dated: January 27, 1975.

/s/ John Garrett Penn
JOHN GARRETT PENN
Judge

APPENDIX C

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal No. 19906-73

UNITED STATES OF AMERICA

v.

BRUCE H. SHREEVES

MEMORANDUM

This case came back for the second phase of a bifurcated [trial] on November 6, 1974. At the first phase the defendant had been found guilty of first degree felony murder (D.C. Code 1973, § 22-2401); second degree murder (D.C. Code 1973, § 22-2403); and armed robbery (D.C. Code 1973, §§ 22-2901, 22-3202).[1] At the

[1] After the completion of the first phase of the bifurcated trial, the case was continued over until August 19, 1974, at the request of the defendant because his psychiatrists were not then available to testify. When the case was called on August 19th, both the defendant and the Government announced that they were not ready to go forward since their respective psychiatrists were not available to testify. The case was then set down for November 4, 1974 (counsel not being available for much of the time between August and November, 1974), however it was not reached on that date because the Court was in trial in another matter.

The record should also reflect that the unavailability of counsel during part of September and October was caused by the fact that both counsel for the Government (John Clark) and the chief counsel for the defendant (Robert Golten) left their respective positions at the United States Attorney's Office and Public Defender Service subsequent to the first phase of this trial. Mr. Clark was thereafter returned as a Special Assistant for the United States Attorney in order to complete the second phase. Mr. Golten was appointed pursuant to the Criminal Justice Act in order to continue his representation of the defendant.

completion of the second phase of the trial the jury found that with respect to all the above charges the defense of insanity had not been established.

After the completion of the instructions at the conclusion of the evidentiary period of the second phase of this case, the Court, sua sponte, excused Juror No. 9 over the objection of the defendant. The Court also excused Juror No. 8 on the motion of the defendant without objection by the Government.[2] The purpose of this memorandum is to set forth for the benefit of counsel, should the defendant appeal on this issue, and for the benefit of the Appellate Court, the reasons for excusing Juror No. 9.

First it should be noted that after the jury announced that it had a verdict in the first phase, they were returned to the courtroom and the Foreman announced a guilty verdict on the charges already referred to in this memorandum. When defendant asked to have the jury polled, the Court directed the clerk to poll the jury by numbers. When the clerk reached Juror No. 9, she at first did not respond, but when addressed by the Court she stated words to the effect "I just don't know". The Court, after conferring with counsel at the bench, gave the standard instruction where the verdict does not appear to be unanimous, and sent the jury back to continue their deliberations in the case. Thereafter, the jury returned, announced the same verdict, and all jurors were polled and all (including Juror No. 9) announced guilty to the three charges.[3]

[2] They were replaced by alternate Jurors Nos. 1 and 2.

[3] The defendant has moved for a new trial and asserts as one of the grounds for his motion the failure of the Court to declare a mistrial after Juror No. 9 was polled and indicated that she was not sure about the verdict. Defendant's contentions are treated in a Memorandum Order by the Court addressed to defendant's motion for new trial.

The same jury was called and seated for the second phase of this trial.[4] During the second phase the Court noticed that Juror No. 9 on many occasions appeared to be nodding and to be inattentive to the proceedings. The same was noted with respect to No. 8 but to a much lesser degree. Early in the case the Court called counsel to the bench and brought this matter to their attention. The Court at that time specifically referred to Jurors Nos. 9 and 8. The Court requested counsel to pay special attention to both jurors. Thereafter, when possible, the Court attempted to note those times when the jurors (in particular Jurors Nos. 9 and 8) appeared not only to be nodding but to be inattentive as well.[5] Based upon this

[4] Although the Court agreed to bifurcate the trial, it ruled that the case would be heard before the same jury. Twelve regular jurors and six alternate jurors were selected to hear this case and during the first phase of the case all jurors were sequestered due to the possibility that the case would generate considerable publicity. See Court's Memorandum Order on the motion for a new trial. On voir dire examination neither counsel for the parties nor the Court directly raised the issue of insanity for obvious reasons, but the Court, with the agreement of counsel, did inquire of the prospective members of the jury whether they would be able to give fair consideration to such defenses as self-defense, insanity, entrapment, etc. The purpose of the question was to hopefully bring forth a response from those who would be troubled by an insanity defense. Two or three prospective jurors approached the bench and advised the Court and counsel that they would have trouble accepting any insanity defense. Those prospective jurors were excused on motion by counsel for cause.

At the beginning of the second phase the Court again permitted a voir dire examination of the eighteen jurors. Although the Court had ruled that it would not allow peremptory challenges, it did advise counsel that it would take a liberal view of any challenge for cause on the issue of insanity. There were no challenges for cause by either side, and all eighteen jurors were again seated in the same order as in the first phase of the trial.

[5] The Court noted the juror, the time, the witness on the stand, and the nature of the testimony being elicited at that time. It should also be noted that the Court made such notations only when some considerable time passed while the juror appeared to be inattentive (from 15 to 30 minutes).

Court's observations, the Court felt that in the interest of justice it had to remove Juror No. 9 even over the strong objections of defense counsel. Needless to say, both sides in the case are entitled to a fair and impartial jury, and a jury which has heard all the evidence to be considered during their deliberations. It should also be noted that at the time the Court removed Juror No. 9 it was well aware that the defendant and his counsel would object and for that very reason the Court had immediately brought this matter to the attention of all counsel during the early part of the second phase of this case so that counsel would be able to respond if the Court chose to take such action sua sponte.

For the record the Court notes a few of the occasions below during which Juror No. 9 appeared to be nodding and inattentive.

1. November 7, 1974—12:15 p.m.
   Direct testimony of Dr. Stammeyer.
2. November 7, 1974—3:30 p.m.
   Direct testimony of Dr. Stammeyer.
3. November 8, 1974—3:10 p.m.
   Cross-examination of Dr. Stammeyer.
4. November 11, 1974—12:53 p.m.
   Direct testimony of Diane Goff.
5. November 13, 1974—11:10 a.m.
   Direct testimony of Dr. Whyte.
6. November 13, 1974—3:00 p.m.
   Direct testimony of Dr. Whyte.
7. November 14, 1974—11:30 a.m.
   Redirect testimony of Dr. Whyte.
8. November 14, 1974—3:03 p.m.
   Direct testimony of Deputy Sheriff Purdy.

9. November 15, 1974—11:15 a.m.
Direct testimony of Dr. Adamo.

10. November 15, 1974—12:20 p.m.
Cross-examination of Dr. Adamo.

11. November 15, 1974—4:35 p.m.
Cross-examination of Dr. Adamo.

12. November 18, 1974—12:05 p.m.
Cross-examination of Dr. Adamo.

13. November 18, 1974—12:30 p.m.
Cross-examination of Dr. Adamo.

14. November 18, 1974—3:20 p.m.
Recross of Dr. Adamo.

15. November 19, 1974—10:50 a.m.
Cross-examination Officer Welborn.

16. November 19, 1974—11:47 a.m.
Direct examination of Dr. Strawinsky.

17. November 19, 1974—3:20 p.m.
Cross-examination of Dr. Strawinsky.

18. November 20, 1974—3:02 p.m.
Cross-examination of Dr. Strawinsky.

Dated: December 9, 1974.

/s/ John Garrett Penn
JOHN GARRETT PENN
Judge

Supreme Court, U. S.
FILED
APR 18 1979
MICHAEL RODAK, JR., CLERK

No. 78-1259

In the Supreme Court of the United States

OCTOBER TERM, 1978

BRUCE H. SHREEVES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1259

BRUCE H. SHREEVES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a-27a) is reported at 395 A. 2d 774. The memorandum opinions of the Superior Court of the District of Columbia (Pet. App. 28a-29a, 30a-34a) are unreported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on November 15, 1978. The petition for a writ of certiorari was filed on February 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner's questioning by police, undertaken without the presence or consent of his attorney, violated his right to the assistance of counsel.

2. Whether, after his arrest in the District of Columbia for unlawful flight to avoid prosecution on homicide charges in Maryland, petitioner was entitled to a court-ordered independent psychiatric evaluation at the time of his extradition.

3. Whether, in a bifurcated felony trial, alternate jurors were properly substituted for inattentive regular jurors during the insanity phase of the trial.

STATEMENT

Following a bifurcated jury trial in the Superior Court of the District of Columbia, petitioner was convicted of felony murder, in violation of 22 D.C. Code 2401; armed robbery, in violation of 22 D.C. Code 2901 and 3202; and second-degree murder, in violation of 22 D.C. Code 2403. He was sentenced to concurrent terms of 20 years to life imprisonment on the felony murder count, 15 years to life on the armed robbery count, and 15 years to life on the second-degree murder count, all to be served consecutively to state sentences previously imposed. The District of Columbia Court of Appeals affirmed in a comprehensive opinion (Pet. App. 1a-27a).

1. The evidence presented at trial is summarized in the opinion of the court of appeals (Pet. App. 2a-10a). Briefly, it showed that on January 26, 1973, petitioner and an accomplice robbed and killed Charles Myles in the District of Columbia. The following day, petitioner committed several additional crimes of violence in Maryland, including killing a second individual and shooting a police officer who had stopped petitioner's car to investigate the Maryland offenses. Thereafter, on January 28, Maryland investigators seized certain incriminating items from petitioner's abandoned car (Pet. App. 2a-4a).

FBI agents arrested petitioner in the District of Columbia on February 2, 1973, and charged him with unlawful flight to avoid prosecution on the Maryland homicide charges. He was advised of his *Miranda* rights, after which he executed a written waiver form. He then freely responded to routine questioning, but he refused to discuss the Maryland killings. Petitioner subsequently consented to talk with a detective from the District of Columbia's Metropolitan Police Department, and he admitted to the detective that he had been near the scene of the District of Columbia homicide at the time Myles was killed (Pet. App. 4a-5a).

On February 3, the day after petitioner's arrest, counsel was appointed to represent him in the extradition proceeding. Two days later, Deputy Sheriff Donald Purdy of the St. Mary's County (Maryland) Police Department came to the District in an effort to persuade petitioner to return to Maryland voluntarily. Purdy first approached petitioner's attorney to seek permission to interview petitioner. When contacted by Purdy, the attorney stated that he would advise petitioner not to talk with Purdy, but that petitioner could make his own decision in that regard. Purdy then sought to interview petitioner regarding the Maryland offenses, but petitioner declined to be interviewed at that time. He stated, however, that he would consent to an interview at some later time. On March 7, Purdy returned to the District to interview petitioner. Purdy did not advise petitioner's counsel of the interview,[1] but he twice advised petitioner of his

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[1]At a pretrial suppression hearing, Purdy testified that during his initial contact with petitioner's counsel on February 5, the attorney indicated that his advice would be "that [petitioner] not talk to [Purdy], but if he did, it was on his own * * * it would be up to him * * *" (III Tr. 496). On two or three occasions

Miranda rights, and he told petitioner that if he wanted his attorney to be present, he would be summoned. Petitioner declined Purdy's offer to obtain the presence of his attorney, and he agreed to the interview. He thereafter made a series of admissions regarding his involvement in the Maryland crimes, portions of which were introduced over objection during the insanity phase of petitioner's trial on the District of Columbia charges (Pet. App. 5a-6a).

2. During this period, petitioner's counsel became concerned about petitioner's mental status. He arranged for a clinical psychologist to evaluate petitioner, and when the psychologist's report supported his concerns, counsel moved, in the extradition proceedings, for an independent psychiatric examination of his client. The government opposed the motion, claiming that the court had authority to order such an examination only when an accused was to stand trial in the District of Columbia. Noting that "any trial of this fugitive will be in Maryland," the government argued that an independent psychiatric evaluation relating to an

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between February 5 and March 7, Purdy had similar conversations with counsel concerning petitioner's interrogation (III Tr. 504). According to Purdy, the attorney informed him that any willingness to submit to questioning was petitioner's "prerogative," since he had furnished his client with "the alternative[s] whether he wanted to talk to [Purdy] or not" (III Tr. 507). Purdy further indicated that he had wanted to contact defense counsel "[f]or the reason I wanted to talk with Shreeves, and I figured [the attorney] would like to be present" (III Tr. 497), and if he had sensed that the attorney deemed it "important" that he attend any interrogation, "I would have been certain that [the attorney was] there" (III Tr. 505-506). The attorney's recollection of his discussion with Purdy was unclear. However, he testified that this was the type of case in which it would have been his practice to advise his client not to respond to police inquiries; he noted that the "last decision" was his client's, and that if his client wanted to talk to the police, the attorney would "certainly want to be there" (IV Tr. 1013, 1016-1017).

insanity defense would serve no purpose at that time. The court denied the defense motion and on March 14 ordered that petitioner be surrendered to Maryland authorities. Following his extradition to Maryland, petitioner underwent psychiatric testing relating to the homicide charges in that State. On April 4, 1973, petitioner was indicted in the District of Columbia for the Myles murder (Pet. App. 7a).

In light of petitioner's notice of intent to raise an insanity defense, the Superior Court of the District of Columbia on August 1, 1973, ordered his commitment to St. Elizabeth's Hospital for mental examination. Because he was being held in Maryland to defend against charges in that jurisdiction, however, petitioner was not admitted to St. Elizabeth's for testing until October 1973. The results of the testing done at that time were subsequently introduced at petitioner's trial (Pet. App. 7a-8a).

3. A bifurcated trial was held. At the conclusion of the merits phase of the trial, the jury returned a verdict of guilty on all counts. The insanity phase of the trial began almost four months later. At the close of the evidence in that phase, and before the jury began its deliberations on the question of insanity, the court discharged one of the jurors because of repeated inattentiveness at trial. The defense objected but then moved for the removal of another juror, also for inattentiveness. The two jurors were replaced by alternate jurors, who had heard all of the evidence presented during both phases of the trial. Following its deliberations, the jury found that petitioner had failed to establish the defense of insanity (Pet. App. 9a-10a).

ARGUMENT

1. Petitioner first contends (Pet. 8-10) that he was improperly denied an independent psychiatric evaluation at the time of the extradition hearing on the

Maryland offenses. This denial, he claims, was based upon the government's erroneous representations that because petitioner faced only Maryland charges, the court lacked authority to order the requested mental examination.

Entitlement to a court-ordered pretrial competency examination in the District of Columbia only attaches upon arrest or upon being formally charged with an offense. 24 D.C. Code 301(a)(1). Since at the time of the interstate extradition hearing petitioner was an interstate fugitive and not yet charged with an offense in the District, there was no issue regarding either his competency for trial or his responsibility for the Myles murder then before the District of Columbia court. Rather, the issues for determination by that court were whether the person demanded was shown to be charged with a crime and whether he was a fugitive. 23 D.C. Code 704; *United States* v. *Green*, 499 F. 2d 538, 540-541 (D.C. Cir. 1974); *Moncrief* v. *Anderson*, 342 F. 2d 902, 904 (D.C. Cir. 1964); see *Hyatt* v. *People of State of New York ex rel. Corkran*, 188 U.S. 691 (1903). In light of the narrow issue before the court in that proceeding, there was no basis for the court to order an examination to probe defenses that petitioner might raise if he were subsequently to be prosecuted on charges in the District of Columbia. See *Lathan* v. *Reid*, 280 F. 2d 66, 69 (D.C. Cir.), cert. denied, 364 U.S. 865 (1960); cf. *United States* v. *Perkins*, 433 F. 2d 1182 (D.C. Cir. 1970).

The premise for petitioner's argument (Pet. 8) is that the government affirmatively misled the court by failing to disclose that he was a potential defendant in the District of Columbia. But the grand jury considering the Myles homicide had not yet returned an indictment, and it continued to take testimony weeks after petitioner had been extradited to Maryland (Pet. App. 16a-17a). There is no constitutional or

statutory mandate that charges be filed as soon as probable cause exists, or even after there is sufficient evidence to establish a suspect's guilt beyond a reasonable doubt, but before an investigation is complete. *United States* v. *Lovasco*, 431 U.S. 783, 792-794 (1977). In light of these facts, the court of appeals properly upheld the trial court's finding that the government was making a good faith effort during this period to present an appropriate case to the grand jury and that it "was not attempting to gain a tactical advantage by delaying [petitioner's] indictment to prevent an immediate mental examination" (Pet. App. 16a-17a).

Petitioner further argues (Pet. 9) that his insanity defense was prejudiced when, because of the denial of his request at the extradition hearing for an independent psychiatric evaluation, he was forced to rely upon the testimony of the clinical psychologist who had examined petitioner shortly after his arrest. As the court of appeals noted (Pet. App. 17a), there is no merit to petitioner's claim of prejudice. Shortly after petitioner was transferred to the Maryland authorities, he underwent a psychiatric examination in that State, the results of which were available to petitioner in his District of Columbia trial. The claim of prejudice is even less compelling in light of the testimony of the psychologist who examined petitioner shortly after his arrest, who stated that he "didn't think that he was psychotic on that date" (XIX Tr. 109).

2. Petitioner next contends (Pet. 10-14) that he was denied his Sixth Amendment right to counsel when he was interrogated by Deputy Sheriff Purdy without the presence or permission of the attorney who had been appointed for him in connection with the extradition proceedings.

Petitioner correctly notes (Pet. 10-12) that there has been a divergence of opinion among the various federal and state appellate courts regarding the validity of a suspect's waiver of the right to the presence of an attorney during interrogation after he has obtained representation. Nonetheless, this Court's recent decision in *Brewer* v. *Williams*, 430 U.S. 387 (1977), and subsequent decisions of various courts of appeals support the view of the court below (Pet. App. 11a-12a) that in appropriate circumstances an accused may validly waive the right to counsel without consulting his attorney.

In *Brewer* v. *Williams*, *supra*, this Court held that the defendant did not waive his right to counsel, but it expressly noted that it did not mean to suggest that the defendant could not have waived his right to counsel without notice to his attorney. 430 U.S. at 405-406. In his concurring opinion, Mr. Justice Powell interpreted the majority opinion as acknowledging that a represented defendant may waive his right to the assistance of counsel: "[T]he opinion of the Court is explicitly clear that the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel." 430 U.S. at 413. The four dissenters concluded that the defendant could—and did—waive his right to counsel. See 430 U.S. at 417 (Burger, C.J., dissenting); *id.* at 433-437 (White, J., dissenting).

The decisions of the courts of appeals since *Brewer* have uniformly refused to find that communications between law enforcement authorities and represented criminal defendants without prior notice to counsel is *per se* violative of the Fifth or Sixth Amendments See, *e.g.*, *United States* v. *Brown*, 569 F. 2d 236 (5th Cir. 1978) (en banc); *United States* v. *Rodriguez-Gastelum*, 569 F. 2d 482 (9th Cir. 1978) (en banc); *United States* v. *Monti*, 557 F. 2d 899 (1st Cir. 1977). Accordingly,

there is no occasion for this Court to resolve the divergent views taken by the various federal and state appellate courts prior to *Brewer* v. *Williams*. Rather, it can reasonably be expected that this conflict will dissipate in light of the view of a majority of the Justices in *Brewer* that in appropriate circumstances, the right to the assistance of counsel may be waived without the presence or permission of counsel.

Unlike *Brewer*, where the incriminating statement itself was the only affirmative act of the defendant that could be advanced to rebut the initial presumption against waiver of counsel, the circumstances in this case clearly establish that petitioner knowingly relinquished that right. Petitioner expressly waived his attorney's presence after twice receiving *Miranda* warnings, and he declined Purdy's offer to summon counsel to the interview. Moreover, petitioner never stated that he wished to consult with his attorney before making statements to the officer.[2] Petitioner's

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[2]There is also questionable basis for petitioner's assertion (Pet. 14) that Purdy circumvented defense counsel's instructions regarding interrogation without his presence. The officer testified that he had contacted counsel "[f]or the reason I wanted to talk to Shreeves, and I figured [the attorney] would like to be present" (III Tr. 497). He further testified that he had interviewed petitioner only after petitioner's counsel had told him that whether to be interviewed or not was the defendant's "prerogative" (III Tr. 507). The defense attorney's recollection as to whether he forbade Purdy from speaking to his client alone was unclear and was predicated on his belief that it would have been his customary practice to attend an interrogation in a case where plea bargaining was not a viable alternative (IV Tr. 1013). Purdy had given counsel explicit and repeated notice that he intended to interview petitioner, and counsel's response to Purdy was couched in terms of petitioner's making the "last decision" (IV Tr. 1013-1017). It is therefore reasonable to conclude, as did the court below (Pet. App. 14a n.10), that the attorney left Purdy with the impression that the option was his client's whether to respond to the officer's questioning.

desire to discuss details of the crimes under investigation with Purdy (although not with a reporter accompanying him) was indicative, the trial court properly ruled, that petitioner understood his rights and intentionally waived them (VII Tr. 1171-1172).[3]

3. Finally, petitioner claims (Pet. 14-16) that the trial court erred in excusing two jurors prior to deliberations in the insanity phase of the trial. The procedure, petitioner contends, violated the provision of Rule 24(c) of the D.C. Superior Court Criminal Rules governing discharge of alternate jurors and was tantamount to a denial of his Sixth Amendment right to trial by jury. Because this issue is one of first impression and because it was correctly decided by the court of appeals, review by this Court is unwarranted.

A trial court, in its sound discretion, has the authority under Fed. R. Crim. P. 24(c) to remove a juror and substitute an alternate if a juror is found to be "unable or disqualified to perform [his] duties." See *United States* v. *Jones*, 534 F. 2d 1344 (9th Cir.), cert. denied, 429 U.S. 840 (1976); *United States* v. *Floyd*, 496 F. 2d 982 (2d Cir.), cert. denied, 419 U.S. 1069 (1974); *United States* v. *Hoffa*, 369 F. 2d 698 (7th Cir. (1966), rev'd on other grounds, 387 U.S. 231 (1967). This is especially true when the release and replacement of a juror for inattentiveness is necessary in order to assure a fair trial. *United States* v. *Cohen*, 530 F. 2d 43 (5th Cir.), cert. denied, 429 U.S. 855 (1976); *United States* v. *Cameron*, 464 F. 2d 333 (3d Cir. 1972).

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[3]The present case is factually dissimilar to *Massiah* v. *United States*, 377 U.S. 201 (1964), where surreptitious means were employed to elicit the inculpatory statements and admissions. *Massiah* did not address the issue of waiver at all, since it involved an unwary defendant having had no opportunity to make an informed decision regarding his right to counsel.

Petitioner discusses at some length (Pet. 16-21) the established principle under Fed. R. Crim. P. 24(c) that alternate jurors ordinarily should not be substituted for original jurors after deliberations have commenced. The cases upon which petitioner relies, however, do not control this case; they address the ordinary situation of a unitary trial, not a bifurcated trial containing an insanity issue. Petitioner's submission, in essence, is that alternate jurors may never be used during the insanity phase of a bifurcated trial when they did not participate in the deliberations on the merits phase.

Rule 24(c) indicates that, until the jurors retire to consider the verdict, the alternates remain on an equal footing with them. The rule makes it clear that the responsibilities of the regular and alternate jury members are coextensive; they have "the same functions, powers, facilities and privileges." Therefore, when jurors are empanelled in a bifurcated trial, their public duty is not fulfilled until the presentation of evidence is completed. Here, the two parts of petitioner's trial were entirely separate and distinct, and the two sets of deliberations were wholly independent. Petitioner himself acknowledged the separateness of the two phases of the trial when he demanded separate juries to try each phase. Evidence was introduced during each part, and the jury was charged after each part as to the applicable law. The substitution of jurors prior to the deliberations at the end of the second phase of the trial was therefore wholly different from the substitution of alternate jurors during the deliberations in a single-phase trial, or in the midst of the deliberations in one or the other phase of a bifurcated trial.

For this reason, there is no risk in this setting of inherent coercion upon the new jurors to accept the prevailing views among the other jurors. Because the insanity phase of the trial is not simply a continuation

of the first phase but constitutes a separate and distinct phase of the decision-making process, the alternate jurors are not in the position of entering unitary deliberations after the deliberations have begun and the remaining jurors have made progress toward reaching a verdict. Particularly in cases such as this one, where the two phases of the bifurcated trial are held weeks or even months apart, to discharge the alternates at the start of the first set of deliberations would create a grave risk of not having a full jury for the second phase of the trial. Thus, even if the court's construction of Superior Court Criminal Rule 24(c) is deemed applicable to cases involving Fed. R. Crim. P. 24(c), the ruling of the court of appeals on this novel issue was sensible, and it did not encroach on petitioner's right to full and fair consideration by the jury in both phases of his trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1259

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Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

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1. *Government interference with insanity defense.* Respondent correctly states but fails to answer petitioner's argument "that the government affirmatively misled the court by failing to disclose that [Shreeves] was a potential defendant in the District of Columbia" (Opp. 6).

Thus, respondent does not dispute the factual predicates for the argument, *i.e.*:

—that at the time the government stated "any trial of [Shreeves] will be in Maryland," the government knew that Shreeves would be charged with and tried for homicide in the District of Columbia.

—that an arrest warrant for Shreeves had already been prepared at the time of his extradition hearing, but that for reasons solely within the government's control it had not been served.

—that if the arrest warrant had been served, it would have been error to deny Shreeves' motion for a psychiatric examination.[1]

Instead, respondent's position is simply that the government was entitled to prevent Shreeves from obtaining a prompt psychiatric examination by (1) delaying the filing of formal charges against him until after his motion for a psychiatric examination had been denied, and (2) making a misstatement of fact to the court presiding over his extradition hearing. Significantly, in taking this position, respondent ignores a key element of petitioner's argument: that in the District of Columbia, the burden of proving an insanity defense rests on the defendant. Whatever might be the case in a jurisdiction where this burden is on the prosecution, interference with a defendant's ability to establish his insanity defense cannot be permitted where the government has already imposed this heavy burden on his defense.

2. *Denial of right to counsel.* Respondent's Opposition intimates that *Brewer* v. *Williams*, 430 U.S. 387 (1977),

[1] *See Cannady* v. *United States*, 122 U.S. App. D.C. 120, 351 F.2d 817 (1965); *Mitchell* v. *United States*, 114 U.S. App. D.C. 353, 316 F.2d 354 (1963); *Ward* v. *United States*, 120 U.S. App. D.C. 311; 346 F.2d 423 (1965). Although respondent persists in arguing that there was "no basis" for the extradition court to order a psychiatric examination (Opp. 6), it fails to point out that the government conceded at the extradition hearing that District of Columbia law authorizes a court-ordered psychiatric examination "when a person will stand trial . . . in the District of Columbia." Opposition to Defendant's Motion for Psychiatric Examination, dated March 8, 1973, at 2. Indeed, in one of the cases cited by respondent, the court *did* order a psychiatric examination in the context of an extradition hearing. *Lathan* v. *Reid*, 108 U.S. App. D.C. 58, 59, 280 F.2d 66, 67, *cert. denied*, 364 U.S. 865 (1960).

determined that a represented defendant could be interrogated without notice to his counsel. In fact, *Brewer* explicitly reserved that question, 430 U.S. at 405-06 and n.11, and reversed a conviction based upon such an interrogation. Similarly, respondent's intimation that since *Brewer* the lower courts have been approaching consensus on this question is wrong. At least two state courts of last resort have held, since *Brewer*, that such interrogation may not be permitted. *People* v. *Tompkins*, 45 N.Y. 2d 48, 380 N.E.2d 311, 408 N.Y.S.2d 485 (1978), *cert. denied*, —— U.S. ——, 99 S. Ct. 1288 (1979); *Commonwealth* v. *Sparrow*, 471 Pa. 490, 370 A.2d 712 (1977).[2] And those federal and state appellate courts that have upheld interrogation without notice to counsel have done so over strong dissents. *See, e.g.*, *United States* v. *Brown*, 569 F.2d 236, 241-48 (5th Cir. 1978) (en banc) (Simpson, Goldberg, Godbold and Morgan, JJ., dissenting); *United States* v. *Rodriguez-Gastelum*, 569 F.2d 482, 488, 489 (9th Cir. 1978) (en banc) (Goodwin, Browning, Anderson, Hufstedler and Ely, JJ., dissenting); *People* v. *Green*, —— Mich. ——, 274 N.W.2d 448, 455, 456 (1979) (Moody, Kavanagh and Levin, JJ., dissenting).[3]

Respondent asserts that "in appropriate circumstances an accused may validly waive the right to counsel without consulting his attorney" (Opp. 8). But in arguing that this case presents such an "appropriate circumstance," respondent once again ignores a critical fact: that at the time of the uncounseled interrogation here, the government was on notice that Shreeves was of ques-

[2] As this Court recently indicated, a conflict among state as well as federal jurisdictions on a question of federal constitutional law provides a basis for a grant of certiorari. *See Delaware* v. *Prouse*, —— U.S. ——, 99 S. Ct. 1391, 1394-95 at nn.2 & 3 (March 27, 1979).

[3] *United States* v. *Monti*, 557 F.2d 899 (1st Cir. 1977), cited by respondent, is hardly on point, involving as it did a defendant who was not in custody and who himself initiated a meeting with secret service agents immediately after consulting with his attorney.

tionable mental competence.[4] To permit the government to bypass Shreeves' attorney under these circumstances cannot, consistent with the Sixth Amendment, be tolerated.[5]

3. *Improper substitution of jurors.* Respondent's argument on this point not only contradicts the government's position below, but distorts the facts. Respondent asserts that:

> "[T]he two parts of petitioner's trial were *entirely separate and distinct*, and the two sets of deliberations were *wholly independent*. . . . The substitution of jurors prior to the deliberations at the end of the second phase of the trial was therefore wholly different from the substitution of alternate jurors during the deliberations in a single-phase trial, or in the midst of the deliberations in one or the other phase of a bifurcated trial" (Opp. 11; emphasis added).

[4] As this Court has just noted, "the question of waiver must be determined on 'the particular facts and circumstances surrounding th[e] case, including the . . . conduct of the accused.'" *North Carolina* v. *Butler*, —— U.S. ——, No. 78-354, slip. op. at 6 (April 24, 1979). Application of this standard would require respondent to explain how a represented defendant can be found knowingly and intelligently to have waived his right to counsel in an interview where he stated: "I believe I am Jesus Christ and that I wrote the Ten Commandments" (Tr. Vol. 3, p. 535).

[5] Respondent's lengthy footnotes (Opp. 3, n.1.; Opp. 9, n.2) attempt to minimize Deputy Purdy's failure to inform Shreeves' attorney, Golton, of his intended interrogation on the ground that Golton had previously indicated that the "last decision" on whether to respond to police questioning was his client's "prerogative." This, of course, is no more than a careful attorney's accurate statement of the law. But, as respondent admits, Golton made it clear that he would advise Shreeves not to talk with Purdy (Tr. Vol. 3, p. 496) and that he would "certainly want to be there" at any interrogation (Tr. Vol. 4, pp. 1016-17). Moreover, respondent appears to concede and makes no attempt to justify the fact that although Purdy was fully aware of Golton's wishes, he made no attempt to contact Golton even though he had ample time to do so while waiting at the jail to see Shreeves.

This "separate and distinct" treatment of the two parts of his trial is precisely what Shreeves requested when he moved for a bifurcated trial with two separate juries. But Shreeves' motion was denied after the government argued:

> "[T]he facts as they are found by the [first phase] jury is what controls on the insanity issue also and, therefore, a stipulation, or even a second jury hearing along with the first jury, could not adequately meet that requirement of law." (Tr. Vol. 1, p. 43.)

In its closing argument at the *insanity* phase, the government emphasized that the two phases of Shreeves' trial were *not separate and distinct*—the precise opposite of what respondent now urges. The jury was told:

> "Now, this brings us to another thing. *This isn't just a separate trial.* You don't forget everything that happened before. You have to take into consideration, when you determine whether or not Bruce Shreeves was nuts, if you want to use that term, on the 26th, that the evidence show you that he did, in that trial, the way he behaved on the night of the 24th as you heard about, the complete day of the 25th and then on the 26th. Was there anything in any of that testimony that showed you that there is a question about that man's ability to know what he was doing and to decide what he wants?
>
> "Was there any kind of indication whatsoever that you heard that showed that? You heard what the defendant was. And you heard how, during the trial, one of the things was a question of who did the shooting. You heard how it didn't matter. It doesn't make a bit of difference.
>
> "*But that comes over and it carries into this too*, and it goes into what the government has argued from the very beginning in this case . . . ." (Tr. Vol. 23, pp. 1578-79; emphasis added.)

Respondent's factual assertions thus cannot be supported by the record in this case.

Respondent's only answer to petitioner's argument that substitution of jurors after deliberations have begun is contrary to Rule 24(c) and the Constitution—an argument based on logic, history, and an unbroken line of case law—is to point to the speculative possibility that some mistrials may result from the unavailability of alternate jurors in the second phase. Of course, this danger can easily be avoided by impaneling two separate juries, as Shreeves initially requested. But, in any event, as this Court held only last week, a state's interest in saving "time and expense [in] the administration of its system of criminal justice" cannot be permitted to transgress "the substance of the jury trial guarantee." *Burch* v. *Louisiana*, —— U.S. ——, 47 U.S.L.W. 4393, 4395 (April 17, 1979).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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